

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1428

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM M. ORDNER, JR.,

Defendant-Appellant.

*Criminal Action on Appeal from the Verdict of the United
States District Court for the Southern District of New York. Set
Below: Robert J. Ward, D.J. with a Jury.*

**BRIEF AND APPENDIX FOR
DEFENDANT-APPELLANT**

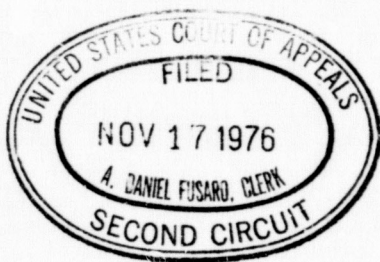
CHARLES J. IRWIN

Attorney for Defendant-Appellant

744 Broad Street

Newark, New Jersey 07102

(201) 622-6351



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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The defendant, William M. Ordner, Jr., was convicted on three Counts of a six Count Indictment. On Appeal, the defendant contends that the Court below erred in the following respects:

1. in ruling that the defendant could be charged with aiding and abetting the commission of a crime wherein the principals lacked capacity to commit the underlying offense and, therefore, committed no crime;
2. the prosecution of the defendant for aiding and abetting the possession of unserialized firearms was barred by virtue of the defendant's license to manufacture firearms;
3. denying defendant's Motions for Acquittal in that defendant had established the defense of entrapment as a matter of law;
4. in admitting a recording excludable under F.R.Ev. 403 and 404(b);
5. in denying defendant's Motion for Acquittal based upon the inconsistency of the Jury's verdict.

STATEMENT OF THE CASE

The instant Appeal is taken from the Verdict of the United States District Court for the Southern District of New York. The Honorable Robert J. Ward, District Judge, sat below with the aid of a Jury.

The defendant, William M. Ordner, Jr., was charged in a six Count indictment as follows:

First Count. Transfer of a firearm (pen gun) not identified by serial number (Appendix 9).

Second Count. Transfer of a firearm (pen gun) without requisite filing and payment of tax and approval of Secretary of Treasury (Appendix 9).

Third Count. Possession of 502 firearms (pen guns) not identified by serial number. 26 USC §5861 (Appendix 10).

Fourth Count. Transfer of 502 firearms (pen guns) without requisite filing and payment of tax and approval of Secretary of Treasury (Appendix 10).

Fifth Count. Possession of three destructive device firearms (grenades) not registered in National Firearms Registration and Transfer Record (Appendix 11).

Sixth Count. Transfer of three destructive device firearms (grenades) without requisite filing and payment of tax and without approval of Secretary of Treasury (Appendix 11).

The defendant was convicted on the First and Second Counts and convicted on the Third Count amended to charge aiding and

abetting only (Transcript 264, 265, 306). The Fourth Count was dismissed by the Court at the close of the Government's case (Transcript 306). The defendant was acquitted of the Fifth and Sixth Counts (Transcript 708). On September 16, 1976, Judge Robert J. Ward sentenced the defendant to ten-year terms of imprisonment on each of the three Counts, such terms to run concurrently. The Court also directed that a study be undertaken and the sentence be reviewed thereafter pursuant to 18 USC §4205. Execution of sentence was stayed pending this Appeal (Transcript 751-754).

The defendant, William M. Ordner, Jr., was employed as a commercial blaster in Connecticut in the Summer of 1975, having been licensed to engage in that activity (Transcript 320).

Ordner was also a designer and manufacturer of firearms and held a federal firearms manufacturer's license issued pursuant to 18 USC §923 (Transcript 320). During the month of August, Ordner met John Romano at a gun show in Connecticut (Transcript 321). Ordner had first met Romano during 1971 and they had not seen each other for a substantial period of time (Transcript 321). Ordner told Romano of his blasting activities, and Romano told Ordner that he knew of a contractor who might have blasting work for Ordner (Transcript 321). Ordner gave Romano his business card (Transcript 321). A few days later Romano showed up at Ordner's place of employment (Transcript 322). Romano reported that he did, in fact, know a contractor in New York who had blasting work (Transcript 322).

Ordner asked his employer whether he was doing work in New York. The employer replied that he was not, but that he knew a blaster there who would pay a commission if Ordner could arrange work (Transcript 323). Ordner told Romano that he was, in fact, interested in meeting the contractor, but that he could not do so until the project he was working on was completed (Transcript 323). Romano called Ordner frequently during this period to check the progress of the project and to arrange a meeting with his contractor.

Unknown to Ordner, Romano was also meeting with Special Agent Joseph Kelly of the Bureau of Alcohol, Tobacco and Firearms (Transcript 30, 152). Romano had been arrested earlier by Kelly (Transcript 29) and the two had arranged for Romano to provide information in exchange for the Bureau's intercession to mitigate any sentence which would be handed down against Romano (Transcript 30, 152). Romano, sometime after meeting Ordner at the gun show, had mentioned him to Kelly (Transcript 155). Kelly instructed Romano to pursue his contact with Ordner (Transcript 155).

Also known to Kelly was Anthony Stagnito, also known as A. Michael Stagg, and "the Bear" (Transcript 29, 153-154). Stagg was a paid informant (Transcript 29, 153) who resided in a \$200,000-\$300,000 home in Armonk, New York (Transcript 31).

Ordner agreed to meet the contractor on August 25, 1975 (Transcript 324). On that date, Romano picked up Ordner and drove him to New York (Transcript 325). Romano drove to a phone

booth and made a phone call (Transcript 325). Soon afterwards a Cadillac arrived and both Ordner and Romano got in (Transcript 326). The driver, known then as "Billy," drove a circuitous route to the Stagg residence (Transcript 561, 327). When Ordner asked the reasons for the elaborate procedure, Romano told him that the contractor did not want to be bothered by a barrage of job seekers (Transcript 327).

The car containing Ordner, Romano, and the driver arrived at the Stagg residence at approximately 8:30 p.m. (Transcript 31). Billy Adams, the driver, directed Ordner and Romano to the dining room (Transcript 330). Stagg was introduced as "Mr. S." (Transcript 332), Kelly as "Joe Keen," and another Special Agent as Stagg's bookkeeper (Transcript 329). Ordner asked about the blasting work and showed his blasting license (Transcript 332). Stagg indicated that he had no need for a blaster (Transcript 336). He told Romano to explain the real purpose of the meeting to Ordner (Transcript 336). In Stagg's words, he wanted to "make good business with Ordner" (Transcript 338). Ordner became frightened (Transcript 338). Ordner explained that he was looking for a blasting job (Transcript 339) and Stagg discontinued the line of conversation (Transcript 339). They ate and had some wine and prepared to leave (Transcript 339-340). Before leaving, Ordner tried to placate Stagg by giving him a can of sweeping compound and representing it as napalm base (Transcript 340). Stagg expressed anger; he told Romano to get something from Ordner or get rid of him.

In conversation with a close friend during this period, Ordner explained his fears and his belief that he had been approached by the mob (Transcript 540-546). Ordner's fears of having met a Mafia chieftain were hardly unexpected. Kelly, Stagg, and Adams (a local police officer) had planned the meeting just that way (Transcript 194).

On September 12, Romano again contacted Ordner (Transcript 344). Romano wanted to know what Ordner could supply to Mr. S. (Transcript 344). Romano showed Ordner a passbook showing a deposit of \$5000 (Transcript 346). Romano indicated that he had been paid the sum to get Ordner to supply the family (Transcript 346). Asked what they wanted from him, Romano replied, "Anything" (Transcript 346). Romano brought home the urgency--"We've got to do something" (Transcript 346). Ordner remembers a meeting at the Stagg residence on September 13 (Transcript 347). The Government contended that the next meeting was at John Romano's wake on September 23 (Transcript 35).

Stagg called Ordner to tell him of Romano's death (Transcript 359). Stagg told Ordner to send flowers and say it was the family (Transcript 367). Stagg told Ordner he would see him at the wake in Brooklyn (Transcript 368).

When Ordner arrived at the wake, Billy Adams was waiting (Transcript 370). He told Ordner that Mr. S. and Keen were in a nearby restaurant waiting to talk to him (Transcript 370). There is little dispute as to the occurrences in the restaurant. Stagg, still playing the part of a Mafia chieftain, welcomed

Ordner into the family (Transcript 176-178, 373), and told Ordner that he was to take Romano's place and fill the void left by his death (Transcript 176-178). Ordner was frightened (Transcript 373). Stagg told Ordner he would discuss it further the next night at his home (Transcript 374), but Ordner didn't know where it was located (Transcript 374). They agreed that Ordner would go to a restaurant in the area and call Stagg (Transcript 375). Stagg dismissed Ordner with a kiss on both cheeks (Transcript 376).

Ordner followed Stagg's instructions, and on the evening of September 24, was driven to Stagg's residence (Transcript 377). In addition to Stagg, Kelly and Adams were present (Transcript 38). Ordner produced a blueprint of a pen gun barrel (Transcript 38, 378) to placate Mr. S. Stagg instructed Ordner to have new blueprints made (Transcript 40). Kelly told Ordner that in addition to the blueprints, a sample pen gun would be required (Transcript 41). Stagg questioned Ordner about his family and cautioned him against going to the authorities (Transcript 385). Stagg threatened Ordner (Transcript 386). Ordner testified that he attempted to contact the United States Attorney nevertheless, but that he was not able to speak with him (Transcript 388, 389).

On September 25, Ordner again reported to the Stagg home (Transcript 390). Ordner had located a pen gun and brought it with him (Transcript 43, 391). Stagg asked Ordner if he could produce pen guns in quantity, and Ordner testified that he refused (Transcript 397). He did volunteer the information that

the firing mechanism could probably be purchased easily (Transcript 397). Stagg pressed for names and addresses of suppliers (Transcript 398). Ordner told Stagg that they were a stock item at marinas and sporting goods shops (Transcript 399). Ordner volunteered the names of possible suppliers (Transcript 399). Kelly called a number of shops (Transcript 401) and finally traced a lot of the items to Dolan's Sporting Goods in Neptune, New Jersey (Transcript 402, 45). Kelly negotiated the price of the items and got directions (Transcript 404, 405, 45). Kelly insisted upon keeping the pen gun that Ordner had brought and it was test fired (Transcript 44). Stagg and Kelly pressed Ordner as to other items he could supply (Transcript 405-410).

Ordner did not hear from Stagg or Kelly until October 5. On that day, Kelly (Joe Keen) called Ordner to set up a meeting for October 6 (Transcript 50). On October 7, Ordner reported to the Stagg residence (Transcript 51). Kelly, Ordner and Adams got into a car and drove to Neptune, New Jersey, where Kelly was to buy flare guns from Dolan's Sporting Goods (Transcript 51, 426). During the trip, Kelly, with the aid of Adams, pressed Ordner for other items which he could supply (Transcript 54). Once in New Jersey, Kelly collected and paid for the flare gun receivers which would be used in creating pen guns and put them in the car for the trip to Armonk (Transcript 57). The receivers were stored in the house (Transcript 65).

On October 10, Kelly, Stagg and Ordner had yet another

meeting (Transcript 99). Stagg indicated that he wanted barrels to be made for the pen guns (Transcript 102). Ordner said he did not have the money to machine them (Transcript 102) and Stagg and/or Kelly advanced same (Transcript 102).

On October 15, Ordner got a call from Joe Keen (Transcript 105). Keen wanted to know where the barrels were (Transcript 105). Ordner promised to have them the following night (Transcript 105). On October 16, Ordner arrived to meet Stagg, Adams, Kelly, and a number of Stagg's relatives. (Transcript 105, 432). The barrels and receivers were assembled (Transcript 433, 107) and a few were tested (Transcript 107, 434). Ordner was given \$1050 (Transcript 109, 435). Ordner testified that he did not ask for this sum, but accepted it (Transcript 435). The discussion then turned to grenades (Transcript 110). Stagg pressed Ordner for grenades which he said were destined for Mexico (Transcript 436).

During this period, there were other occurrences that caused Ordner great concern. Ordner's daughter told him that someone had attempted to abduct her (Transcript 550). Ordner went to visit a friend (a publisher in Massachusetts) and told him of his fear for himself and his family (Transcript 525-530). The friend recalled how frightened Ordner was (Transcript 529).

Ordner received a number of calls respecting the grenades (Transcript 437), but it was not until learning of the attempted abduction of his daughter that he decided to supply them

(Transcript 437). On November 8, 1975, Ordner turned over three grenades to Kelly and Stagg (Transcript 134, 135, 440).

On December 17, 1975, Ordner was again instructed to come to the Stagg residence, where he was arrested (Transcript 142, 145, 442).

Ordner testified in depth concerning his belief that Stagg was a mobster and that his failure to supply Stagg would result in his demise or harm visiting his family.

The Government's principal witness, Special Agent Kelly, admitted to the scheme to convince Ordner that he was dealing with the mob (Transcript 179-194), and that he was aware that Ordner believed the ruse (Transcript 199). He admitted that Ordner had never told him that he had sold weapons to anyone other than the Government (Transcript 180, 181). He admitted to permitting Ordner to believe that he was to take Romano's place in the mob (Transcript 177, 178), and that he had always called Ordner, but that Ordner had not called him (Transcript 189, 190). He admitted that it was he, in fact, who purchased the pen gun receivers (Transcript 192), and that he and Stagg had, in fact, pressed Ordner to get something better, something bigger (Transcript 192). Billy Adams also testified that at their first meeting, Ordner indicated that he was a blaster (Transcript 562), and that he had, in fact, taken orders from Stagg to convince Ordner that he was in contact with the mob (Transcript 561, 562, 566).

The Government's case also rested on a tape recording which Kelly had made in the car during the trip from Armonk,

New York to Neptune, New Jersey on the evening of October 7. During that trip Kelly discussed with Ordner the various weapons which the latter had come across in his career in the firearms business. The tape was marked Government Exhibit 5 (Transcript 67), and was played to the jury in its entirety. The defense objected to the admission of the tapes on the ground that they were irrelevant and highly prejudicial (Transcript 58, 69, 309). At the close of the Government's case, it became clear that Ordner had neither possessed nor transferred the 502 pen guns. Count Four was dismissed and Count Three amended so as to charge aiding and abetting the possession of the 502 pen guns (Transcript 264). The defense objected to such amendment (Transcript 301). The defense later moved for a directed verdict as entrapment had been established as a matter of law (Transcript 318), which Motion was denied. After the verdict, the defense moved for an acquittal, notwithstanding the verdict, for the foregoing reasons, and for the inconsistency thereof. That Motion was similarly denied (Transcript 722, et. seq.).

ARGUMENT

POINT I

THE COURT ERRED IN RULING THAT THE DEFENDANT COULD BE CHARGED WITH AIDING AND ABETTING THE COMMISSION OF A NON-CRIMINAL ACT.

This Appeal raises the legal sufficiency of a conviction for aiding and abetting an act which was not proscribed. The Court below, over defendant's objection, permitted the Government to proceed on the Third Count of the Indictment (Appendix 10), amended to charge only that the defendant aided and abetted one or more government law enforcement agents to possess unserialized firearms in violation of 18 USC §2(b) and 26 USC §5861 (Appendix 7). The defendant contends on Appeal that the Court erred in permitting the Third Count to go to the Jury and in denying defendant's post-verdict Motion respecting the legal insufficiency of the Third Count as amended.

The possession of a firearm which is not identified by a serial number is proscribed by virtue of 26 USC §5861 (Appendix 7). Aiding and abetting a person to possess such a firearm is proscribed by virtue of 18 USC §2(b).

The burden of the Government with respect to establishing the guilt of an aider and abettor was recently reiterated in the case of United States v. Deutsch, 451 F.2d 98, 118 (2nd Cir. 1971) cert. denied 404 US 1019 (1972):

To sustain the conviction of one who has been charged as an aider and abettor, it is necessary that there be evidence showing an offense to have been committed by the principal, and that the principal was aided and abetted by the accused...

The Government clearly does not have to prove that the principal was convicted or acquitted as part of its case.

Id. at 119.

It is equally clear that a conviction for aiding and abetting can be had where the principal is innocent, that is, lacks the state of mind necessary to secure his conviction. United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966) cert. denied 385 U.S. 1002 (1967); United States v. Kelner, 534 F.2d 1020 (2nd Cir. 1976).

In the case of United States v. Kelner, supra, the Government secured a conviction of a defendant under 18 USC §§2, 875(c) for aiding and abetting the interstate threats to injure another. The defendant contended that since the principals, namely the television crew which innocently transmitted the threats, could not be convicted, his conviction had to be set aside. The holding in United States v. Kelner, supra, was the basis of the Court's ruling below.

The instant Appeal does not present such a situation. In United States v. Kelner, supra, the principals innocently committed the offense charged; in the instant case, the principals, government law enforcement officers, committed no offense.

By its very language, the holding in United States v. Kelner, supra, was grounded upon the earlier ruling in United States v.

Lester, supra. In that case, the Court expressly holds that the principal must have the capacity to commit the crime before another can be held for aiding and abetting such principal:

Although a literal reading of the predecessor of present 18 USC §2(b) only made punishable as principal one who willfully caused an act to be done "which if directly performed by him" would be an offense against the United States [62 Stat. 684(1948)], it was declared that a person incapable of committing a particular offense against the United States was nonetheless punishable as a principal if he willfully caused an innocent person, capable of doing so, to commit the proscribed act.

(emphasis added)

To the same effect is the earlier ruling in Shuttlesworth v. Birmingham, 373 U.S. 262, 265 (1963), wherein the Supreme Court held:

It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act. See, e.g., Edwards v. United States, 286 F.2d 681 (C.A. 5th Cir. 1960); Meredith v. United States, 238 F.2d 535 (C.A. 4th Cir. 1956); Colosacco v. United States, 196 F.2d 165 (C.A. 10th Cir. 1952); Karrell v. United States, 181 F.2d 981, 985 (C.A. 9th Cir. 1950); Manning v. Biddle, 14 F.2d 518 (C.A. 8th Cir. 1926); Kelley v. Florida, 79 Fla. 182, 83 So. 909 (1920); Commonwealth v. Long, 246 Ky. 809, 811-812, 56 S.W.2d 524, 525 (1933); Cummings v. Commonwealth, 221 Ky. 301, 313, 298 S.W. 943, 948 (1927); State v. St. Philip, 169 La. 468, 471-472, 125 So. 451, 452 (1929); State v. Haines, 51 La. Ann. 731, 25 So. 372 (1899); Wages v. State, 210 Miss. 187, 190, 49 So.2d 246, 248 (1950); State v. Cushing, 61 Nev. 132, 146, 120 P. 2d 208, 215 (1941); State v. Hess, 233 Wis. 4, 8-9, 288 N.W. 275, 277 (1939); cf. Langham v. State, 243 Ala. 564, 571, 11 So.2d 131, 137 (1942).

As the Government conceded below, a law enforcement officer commits no offense when he possesses an unserialized firearm obtained while collecting evidence against an accused (Transcript 246); he is, in fact, incapable of committing such an offense. See United States v. Davis, 272 F2d. 149 (7th Cir. 1959).

The requirement in the prosecution of an aider and abettor that the principal have committed the unlawful act and, thus, that he be capable of committing the offense, is not merely a legal nicety. To hold otherwise would lead to absurd consequences. The defendant, for example, could be licensed to engage in a particular course of conduct. He is, therefore, incapable of committing the offense of engaging therein without a license. Could the defendant be convicted of aiding and abetting another licensee in engaging in what is lawful conduct for that licensee as well? The defendant submits that the rule of law is that the principal must be capable of committing the offense before an individual may be held as an aider and abettor. Further, the defendant submits that it is a sound rule of law and requires the reversal of defendant's conviction on the Third Count.

POINT II

THE COURT ERRED IN RULING THAT THE DEFENDANT,
HOLDER OF A FEDERAL FIREARM MANUFACTURER'S
LICENSE, COULD BE FOUND GUILTY OF AIDING
AND ABETTING THE POSSESSION OF UNSERIALIZED
FIREARMS.

It was not disputed at trial that at the time of the occurrences underlying the Government's case, the defendant was the holder of a valid federal license to engage in the manufacture of firearms other than destructive devices (18 USC §923). The defendant contended that insomuch as he possessed a license to manufacture firearms, the charge of aiding and abetting the possession of unserialized firearms under 18 USC 2(b) and 26 USC §5861 was the legal equivalent to a charge of unlawful manufacture of firearms in violation of 18 USC §923 and 26 USC §5861.

18 USC §923(a) provides, in part:

No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows...

While the defendant is unable to point to precedent directly in point, a reading of the federal firearms laws requires that a manufacturer must enjoy limited protection from the proscriptions of 26 USC §5861 (Appendix 7).

By virtue of 27 C.F.R. §178.92, every manufacturer is required to identify by serial number every firearm manufactured:

Each licensed manufacturer or licensed importer of any firearm manufactured or imported on or after the effective date of this part shall legibly identify each such firearm by engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame or receiver thereof in a manner not susceptible of being readily obliterated, altered, or removed, an individual serial number placed by the manufacturer or importer on any other firearm, and by engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame, receiver, or barrel thereof in a manner not susceptible of being readily obliterated, altered or removed, the model, if such designation has been made; the caliber or gauge; the name (or recognized abbreviation of same) of the manufacturer and also, when applicable, of the importer; in the case of a domestically made firearm, the city and State (or recognized abbreviation thereof) wherein the licensed manufacturer maintains his place of business; and in the case of an imported firearm, the name of the country in which manufactured and the city and State (or recognized abbreviation thereof) of the importer: Provided, That the Director may authorize other means of identification of the licensed manufacturer or licensed importer upon receipt of letter application, in duplicate, from same showing that such other identification is reasonable and will not hinder the effective administration of this part: Provided, further, That in the case of a destructive device, the Director may authorize other means of identifying that weapon upon receipt of letter application, in duplicate, from the licensed manufacturer or licensed importer showing that engraving, casting, or stamping (impressing) such a weapon would be dangerous or impracticable. A firearm frame or receiver which is not a component part of a complete weapon at the time it is sold,

shipped, or otherwise disposed of by a licensed manufacturer or licensed importer, shall be identified as required by this section.

Where the manufacturer completes the process of manufacture, 26 USC §5861 and 27 C.F.R. 178.92 must be read to require serialization prior to the completion of such manufacture.

Where a manufacturer is engaged in the manufacture of components which will be assembled by another into a firearm as defined in 26 USC §5845, the manufacturer is not required to serialize, as his product is not a firearm.

Notwithstanding the foregoing, the Court below ruled that Ordner, himself licensed to manufacture firearms, aided and abetted Government agents to possess unserialized firearms by supplying components necessary to the manufacture thereof.

While the defendant did not violate the applicable statutes and regulations in that he did not complete the process of manufacture and, therefore, was not required to place serial numbers upon the components, the Court ruled that he could be convicted of aiding and abetting the possession of unserialized firearms. Manufacture by its very nature is directed at bringing about possession of the finished product. Where, as here, the defendant's conduct was in compliance with applicable statutes and regulations, such compliance must constitute a defense to a later charge of aiding and abetting unlawful possession of his goods.

POINT III

THE COURT ERRED IN DENYING DEFENDANT'S
MOTIONS BASED UPON SHOWING OF ENTRAPMENT
AS A MATTER OF LAW.

At trial the defendant relied upon the defenses of duress and entrapment. As illustrated in the Statement of the Case, infra, the defendant contended that he was induced, or, more properly, compelled by Government agents posing as representatives of organized crime to supply the firearms as charged in the Indictment. The bulk of the defendant's testimony concerning incidents which gave rise to the prosecution were corroborated by witnesses for the Government. The defendant moved for a directed verdict, and later for an acquittal notwithstanding the verdict, on the ground that facts adduced at trial established the defense of entrapment as a matter of law. The defendant submits on Appeal that the Court erred in denying defendant's Motions in that such defense had been proved as a matter of law.

Entrapment is a defense when the criminal design with which the defendant is charged originated with the Government and they implant the disposition to commit the offense in the mind of an innocent person and induce its commission in order to prosecute. Sherman v. United States, 356 U.S. 369(1958); Sorrells v. United States, 287 U.S. 435(1932).

The defense of entrapment is available even where the Government is aided in its endeavors by persons who are not

law enforcement personnel in the strict sense but act as their agents. Sherman v. United States, supra at 374 et. seq.; United States v. Mayo, 498 F.2d 713 (D.C. Cir. 1974).

In the recent case of United States v. Russell, 411 U.S. 423 (1973), the Supreme Court reaffirmed the holdings in Sorrells v. United States, supra, and Sherman v. United States, supra; held the Court at 436:

...when the Government's deception actually implants the criminal design in the mind of the defendant...the defense of entrapment comes into play...

The standard to be employed in measuring the defense of entrapment was set forth in Judge Learned Hand's decision in United States v. Sherman, 200 F.2d 880,882 (2nd Cir. 1952):

[I]n such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it.

Once the inducement has been established, it is the burden of the Government to prove predisposition in one of the following ways:

(1) an existing course of criminal conduct similar to crime for which defendant is charged;

(2) already formed design on part of accused to commit crime for which he is charged; or

(3) willingness to commit the crime for which he is charged, evidenced by accused's ready response to inducement.

United States v. Viviano, 437 F.2d 295 (2nd Cir.) cert. denied

In Sherman v. United States, supra, the Court was presented with a narcotics violation. Kalchinian, a government informer, induced the defendant to supply him with narcotics by repeatedly appealing to Sherman's sympathies after feigning addiction. The defendant was paid for the drugs. The Supreme Court held that the defense of entrapment had been established as a matter of law. The Court found, at 373:

It is patently clear that petitioner was induced by Kalchinian. The informer himself testified that, believing petitioner to be undergoing a cure for narcotics addiction, he nonetheless sought to persuade petitioner to obtain for him a source of narcotics. In Kalchinian's own words we are told of the accidental, yet recurring, meetings, the ensuing conversations concerning mutual experiences in regard to narcotic addiction, and then of Kalchinian's resort to sympathy. One request was not enough, for Kalchinian tells us that additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation. Kalchinian not only procured a source of narcotics but apparently also induced petitioner to return to the habit. Finally, assured of a catch, Kalchinian informed the authorities so that they could close the net. The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced. It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement. In his

testimony the federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with petitioner. The Government cannot make such use of an informer and then claim disassociation through ignorance.

The instant case presents a more potent inducement than that shown in Sherman v. United States, supra. Government agents sought to convince the defendant that he had been approached by organized crime (Transcript 194). They were aware that the defendant believed the ruse and was frightened (Transcript 199). They admit that it was a Government agent who contacted the defendant and not vice versa (Transcript 155). That it was Government agents and informants that called Ordner; that during the months he did not seek them out (Transcript 170). The Government admitted that the defendant told of selling weapons only to the Government itself (Transcript 181), and that they pressed him for something more, something bigger. The record testifies to the reasonable fears which the defendant entertained in response to the Government's scheme. The defendant was invited to a legitimate business meeting only to find himself in what appeared to be a meeting of organized crime. The man who lures him to the meeting dies soon afterwards, and he is told he will take his place. The defendant is contacted time after time. He returns to visit with Mr. S. on numerous occasions, but only when called. And for what reason? Surely it was not money. On rare occasions the Government reimburses him for his expenses (Transcript 102). On one occasion they

give him \$1050 (Transcript 109). The death of John Romano was obviously not planned by the Government, but when the opportunity presented itself, they used it (Transcript 172, et. seq.)

This is not to say that there is no difference between the factual contentions of the Government and those of the defendant. The Government agents deny making actual threats of physical violence (Transcript 205). There is no evidence that the attempted abduction of the defendant's daughter was perpetrated by Government agents, though the Government introduced no evidence to controvert that the attempted abduction occurred.

It cannot be said, however, that the Government proved the predisposition of the defendant by establishing that he engaged in a course of criminal conduct similar to the one charged. The evidence demonstrates that the agents were aware that he supplied weapons to the Government alone (Transcript 181). Similarly, it would be difficult to prove that he had already formed a criminal design, when it is conceded that the defendant didn't offer any firearms at the first meeting (Transcript 167) and, in fact, had to be contacted on numerous occasions and "brought into the family" before he brought the first firearm to the agents, a single pen gun. He received not a dime for this weapon.

Even relying on the witnesses for the Government, it is difficult to imagine that the defendant readily responded to

inducement. If the defendant had wanted to engage in the sale of firearms to the agents, it is clear he would have pursued a different course of conduct. He would have required payment for the items he supplied; he would have contacted the agents rather than waiting to be called. In short, the defendant would have acted as if engaged in a business transaction. See United States v. Judice, 457 F.2d 414, 417 (5th Cir.) cert. denied, 409 U.S. 886 (1972).

Thus, even when viewing the Government's case most favorably, the predisposition of the defendant has not been shown and the defense of entrapment must be considered to have been established as a matter of law. Sherman v. United States, supra.

POINT IV

THE COURT ERRED IN ADMITTING A TAPE RECORDING OVER DEFENDANT'S OBJECTION.

Early in the presentment of its case, the Government sought admission into evidence of a certain tape recording made by Special Agent Joseph Kelly (Transcript 67). The Court admitted the tape over defendant's objection (Transcript 58). The tape was subsequently admitted and played to the Jury in its entirety (Transcript 83). In the recorded conversation the defendant recounted the multitude of firearms and destructive devices with which he had become acquainted in his long career in the firearms industry. The defendant contends that the admission of the tapes constituted reversible error in that:

(a) the recording was irrelevant as defined by F.R.Ev. 402;

(b) was excludable under F.R.Ev. 403 and was excludable as impermissible character evidence under F.R.Ev. 404(b).

Federal Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character

of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The legislative history underlying these provisions indicates an interaction between Rules 403 and 404(b). The Senate Judiciary Committee found as to Rule 404(b) that:

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

U. S. Code Congressional and Administrative News,
93rd Congress, 2d. Sess. at 61.

In United States v. Patterson, 495 F.2d 107 (D.C.Cir. 1974), the defendant was charged with illegal possession of a firearm muffler and silencer. The defendant had originally been arrested for assault with a deadly weapon, that arrest stemming from a shooting. The trial judge ruled that the prosecutor would be prohibited from informing the jury of the original arrest ground or that anyone had been shot.

At trial, however, the prosecutor conveyed the information as to the shooting in an attempt to impeach a defense witness.

The defense attorney requested a mistrial and, in the alternative, curative instruction. The Court promptly and unequivocally issued a curative instruction to the jury, and permitted the trial to continue. The defendant was convicted.

On appeal, the defendant claimed error in the denial of a mistrial. The Court found that while a curative instruction had eliminated the prejudicial error, even the implied suggestion that the defendant was involved in a shooting was inherently prejudicial. Id. at 112. The Court also stated the general rule with regard to the exclusion of relevant evidence:

There is little doubt both that the question should never have been asked, and that the prosecutor had been alerted as to its inflammatory nature. It is an axiom of the law of evidence that information will be excluded when its probative effect is outweighed by its prejudice to the opposing party.

Id. (citing the then proposed Federal Rule of Evidence 403, among other sources).

The case of United States v. Tomaiolo, 249 F.2d 683 (2nd Cir. 1957) also presents a situation involving the relevance-prejudice dichotomy. There the defendant was charged with conspiracy, bank robbery, and putting in jeopardy the lives of bank employees. On cross-examination of the defendant, the prosecutor engaged in lengthy questioning relating to prior crimes and bad acts committed by the defendant.

On appeal the Second Circuit stated:

We cannot see that any of this detail was relevant to the charge on trial; it went far beyond what was necessary to establish a criminal conviction for the

purpose of impeaching credibility. Its obvious purpose and effect was to do more than to impeach defendant's credibility--it was intended to show that he was a dangerous criminal. Although the degree to which counsel may dwell on a particular point is within the discretion of the trial judge, it seems to us that here this discretion was not wisely exercised.

Id. at 687 (citations omitted).

It must first be noted that if the contents of the tape were relevant, they were relevant with respect to the Third and Fourth Counts (aiding and abetting possession of unserialized firearms and transferring unserialized firearms, respectively). The Fourth Count was dismissed by the trial Court. As noted infra, Count Three was not properly before the Court. Accordingly, the tape lacked that degree of relevance required of all competent evidence irrespective of its prejudicial character. F.R.Ev. 402. The tape clearly had no relevance to the remaining Counts.

When the prejudicial character of the tape is considered, however, the exclusion is required, whether or not the Third Count was properly before the Court. As the summary of the tape indicates, very little of the hours of conversation recorded thereupon was relevant even to the charge of aiding and abetting the possession of unserialized firearms. Thus, weighing what must be considered insubstantial relevant evidence provided by the tape against the more substantial irrelevant but highly prejudicial material contained there, the balance should have been resolved in favor of exclusion.

There is no question but that the Jury was influenced by the many hours of tapes. As the tapes clearly do not contain evidence bearing upon a course of criminal conduct or a preformed criminal design, then the Government must surely contend that they bear upon the defendant's willingness to commit the crime by his ready response to the Government's inducement. By utilizing the tapes, however, the Government can only prove that the defendant was familiar with firearms and encourage the Jury to find him guilty by virtue of that association. The inflammatory effect of having the defendant discuss an arsenal of firearms unconnected with the prosecution is undeniable; so is the prejudice. It is the sort of prejudice which F.R.Ev. 403 and 404(b) were intended to exclude.

POINT V

THE COURT ERRED IN PERMITTING THE INCON-
SISTENT VERDICT OF THE JURY TO STAND.

The verdict of the Jury was clearly inconsistent in that they found the defendant guilty on the First, Second and Third Counts, while acquitting him on the Fifth and Sixth Counts based upon the defense of entrapment. Since the offenses charged grew out of the same transaction and inducement by the Government, the verdict was legally inconsistent and ought to have been set aside.

Generally, consistency in verdicts is not required. Hamling v. United States, 418 U.S. 87, 101(1973).

However, where there is no factual basis for the Jury's finding that a defense raised by the defendant was a bar to prosecution on one Count but not on another, the verdict will be set aside. United States v. Oquendo, 505 F.2d 1307, 1309 (5th Cir. 1975).

In United States v. Oquendo, supra, the defendant was charged in multiple Counts (and Indictments) with distribution of narcotics. The Court held that a conviction on some but not all of the Counts was not defective in that there was a factual basis for same. See also Marquez Anaya v. United States, 319 F.2d 610, 611(5th Cir. 1963).

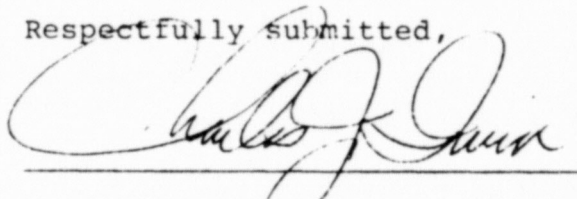
In the instant case the defendant presented the very same defense, that of entrapment, to all Counts. To do so the

defendant had to admit the acts complained of, but raise the bar of Government inducement. There was no construction of the facts which could have been employed to arrive at the split verdict reached by the Jury and, accordingly, it must be set aside.

CONCLUSION

For the foregoing reasons, the defendant prays that the United States Circuit Court of Appeals for the Second Circuit overturn the Verdict of the United States District Court for the Southern District of New York, finding him guilty on the First, Second, and Third Counts of the Indictment in this matter, or such part of that Verdict as the Court deems just.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Charles J. Irwin", is written over a horizontal line.

CHARLES J. IRWIN
Attorney for defendant-appellant

UNITED STATES CODE

TITLE 26

§5811

Transfer tax

(a) Rate.--There shall be levied, collected and paid on firearms transferred a tax at the rate of \$200 for each firearm transferred, except, the transfer tax on any firearm classified as any other weapon under section 5845(e) shall be at the rate of \$5 for each such firearm transferred.

(b) By whom paid.--The tax imposed by subsection (a) of this section shall be paid by the transferor.

(c) Payment.--The tax imposed by subsection (a) of this section shall be payable by the appropriate stamps prescribed for payment by the Secretary or his delegate.

UNITED STATES CODE

TITLE 26

§5812

Transfers

(a) Application.--A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession.--The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

UNITED STATES CODE

TITLE 26

§5842

Identification of firearms

(a) Identification of firearms other than destructive devices.--Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not be readily removed, obliterated, or altered, the name of the manufacturer, importer, or maker, and such other identification as the Secretary or his delegate may by regulations prescribe.

(b) Firearms without serial number.--Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by subsection (a) of this section shall identify the firearm with a serial number assigned by the Secretary or his delegate and any other information the Secretary or his delegate may by regulations prescribe.

(c) Identification of destructive device.--Any firearm classified as a destructive device shall be identified in such manner as the Secretary or his delegate may by regulations prescribe.

UNITED STATES CODE

TITLE 26

(pp. 4a-6a)

§5845

Definitions

For the purpose of this chapter--

(a) Firearm.--The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun.--The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle.--The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(d) Shotgun.--The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot)

or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

(e) Any other weapon.--The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

(f) Destructive device.--The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary of the Treasury or his delegate finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

(g) Antique firearm.--The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or

replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(h) Unserviceable firearm.--The term "unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to firing condition.

(i) Make.--The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

(j) Transfer.--The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

(k) Dealer.--The term "dealer" means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans.

(l) Importer.--The term "importer" means any person who is engaged in the business of importing or bringing firearms into the United States.

(m) Manufacturer.--The term "manufacturer" means any person who is engaged in the business of manufacturing firearms.

UNITED STATES CODE

TITLE 26

§5861

Prohibited acts

It shall be unlawful for any person--

- (a) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required by section 5801 for his business or having registered as required by section 5802; or
- (b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or
- (c) to receive or possess a firearm made in violation of the provisions of this chapter; or
- (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or
- (e) to transfer a firearm in violation of the provisions of this chapter; or
- (f) to make a firearm in violation of the provisions of this chapter; or
- (g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or
- (h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered; or
- (i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or
- (j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter; or
- (k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or
- (l) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

UNITED STATES CODE

TITLE 26

§5871

Penalties.

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

INDICTMENT OF WILLIAM M. ORDNER, JR.

UNITED STATES DISTRICT COURT (pp. 9a-11a)
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

- v - :

WILLIAM M. ORDNER, JR., :

Defendant. :

INDICTMENT

76 Cr.

COUNT ONE

The Grand Jury charges:

On or about the 25th day of September, 1975, in the Southern District of New York, WILLIAM M. ORDNER, JR., the defendant, unlawfully, wilfully and knowingly did receive and possess a firearm, namely, a .25 Caliber "Pen Gun" capable of being concealed on the person, which was not identified by a serial number as required by Chapter 53 of Title 26, United States Code.

(Title 26, United States Code, Sections 5842, 5845(a) and (e), 5861(i) and 5871.)

COUNT TWO

The Grand Jury further charges:

1. On or about the 25th day of September, 1975, in the Southern District of New York, WILLIAM M. ORDNER, JR., the defendant, unlawfully, wilfully and knowingly did transfer a firearm, namely, a .25 Caliber "Pen Gun" capable of being concealed on the person.

2. The transfer of said firearm was in violation of Title 26, United States Code, Section 5812, in that the defendant had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearm, had not paid the transfer tax required by Title 26, United States Code, Section 5811, and had not obtained the approval of the Secretary of the

Treasury or his delegate for the transfer and registration of the firearm.

(Title 26, United States Code, Sections 5811, 5812, 5845(a), (e) and (j), 5861(e) and 5871.)

COUNT THREE

The Grand Jury further charges:

On or about the 16th day of October, 1975, in the Southern District of New York, WILLIAM M. ORDNER, JR., the defendant, unlawfully, wilfully and knowingly did receive and possess firearms, namely, approximately 502 .25 Caliber "Pen Guns" capable of being concealed on the person, none of which was identified by a serial number as required by Chapter 53 of Title 26, United States Code.

(Title 26, United States Code, Sections 5842, 5845(a) and (e), 5861(i) and 5871.)

COUNT FOUR

The Grand Jury further charges:

1. On or about the 16th day of October, 1975, in the Southern District of New York, WILLIAM M. ORDNER, JR., the defendant, unlawfully, wilfully and knowingly did transfer firearms, namely, approximately 502 .25 Caliber "Pen Guns" capable of being concealed on the person.

2. The transfer of said firearms was in violation of Title 26, United States Code, Section 5812, in that the defendant had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearms, had not paid the transfer tax required by Title 26, United States Code, Section 5811, and had not obtained the approval of the Secretary of the Treasury or his delegate for the transfer and registration of the firearms.

(Title 26, United States Code, Sections 5811, 5812, 5845(a), (e) and (j), 5861(e) and 5871.)

COUNT FIVE

The Grand Jury further charges:

On or about the 8th day of November, 1975, in the Southern District of New York, WILLIAM M. ORDNER, JR., the defendant, unlawfully, wilfully and knowingly did receive and possess three destructive device-type firearms, namely, three Green Pineapple-Type Hand Grenades, each having a European-Type Fuse, which were not registered to him in the National Firearms Registration and Transfer Record.

(Title 26, United States Code, Sections 5845(a) and (f)(1)(B), 5861(d) and 5871.)

COUNT SIX

The Grand Jury further charges:

1. On or about the 8th day of November, 1975, in the Southern District of New York, WILLIAM M. ORDNER, JR., the defendant, unlawfully, wilfully and knowingly did transfer three destructive device-type firearms, namely, three Green Pineapple-Type Hand Grenades, each having a European-Type Fuse.

2. The transfer of said firearms was in violation of Title 26, United States Code, Section 5812, in that the defendant had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearms, had not paid the transfer tax required by Title 26, United States Code, Section 5811, and had not obtained the approval of the Secretary of the Treasury or his delegate for the transfer and registration of the firearms.

(Title 26, United States Code, Sections 5811, 5812, 5845(a), (f)(1)(B) and (j), 5861(e) and 5871.)

FOREMAN

THOMAS J. CANTILL
United States Attorney

11a

BEST COPY AVAILABLE

GOVERNMENT'S MEMORANDUM OF LAW ON THE ISSUES OF DURESS
AND ENTRAPMENT AS DEFENSES (Pp. 12a-15a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES AMERICA,

-v-

WILLIAM M. ORDNER, JR.,

Defendant.

76 Cr. 222 (RJW)

GOVERNMENT'S MEMORANDUM
OF LAW ON THE ISSUES OF
DURESS AND ENTRAPMENT
AS DEFENSES

The Government respectfully submits this memorandum of law as an aid to the Court on the issues of duress and entrapment as defenses.

The Defense of Duress

Duress is an affirmative defense, in the sense that the defendant has the burden of coming forward with evidence showing duress, and has the burden of showing duress by a preponderance of the evidence.

United States v. Stevison, 471 F.2d 143, 147 (7th Cir. 1972), cert. denied, 411 U.S. 950 (1973). See also: Proposed Federal Criminal Code, §§ 111. 531 (1974).

This is so because the law "assumes the freedom of the will as a working hypothesis in the solution its problems," Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) (Cardozo, J.); and "that mature and rational persons are in control of their own conduct," Gregg Cartage & Storage Co. v. United States, 316 U.S. 74 (1942) (Jackson, J.). See generally 22 C.J.S., Criminal Law § 44 (1961, and 1974 supra): Annot., 40 A.L.R. 2d 908 (1955); 15 Am. Jur., Criminal Law § 318 (1954); Model Penal Code, § 2.09.

To establish a defense of duress, a defendant must show that he acted under coercion which is "immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury." Shannon v. United States, 76 F.2d 490 (10th Cir. 1935). See also: Gillars v. United States, 182 F.2d 962, 976 and n. 14 (D.C. Cir. 1950); United States v. Palmer, 458 F.2d 663, 665 (9th Cir. 1972); R.I. Recreation Center v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949). See generally, United States v. Vigol, 2 U.S. (2 Dall.) 346, 347 (1775).

A fear that is vague or imprecise, or that is not of immediate harm, is insufficient to substantiate the defense. Gillars v. United States, supra.

Thus, if a defendant at some point can avoid participation in a crime without immediate threat of death or serious injury, he cannot assert the defense of coercion. See United States v. Stevison, supra; United States v. Nickels, 502 F.2d 1173, 1177 (7th Cir. 1974); United States v. Birch, 470 F.2d 808 (4th Cir. 1972) (fear of unjust imprisonment no defense); Iva Ikuko Toguri D'Aquion v. United States, 192 F.2d 338, 357-364 (9th Cir. 1951), cert denied, 343 U.S. 935 (1952); R.I. Recreation Center v. Aetna Casualty & Surety Co., Supra.

The Defense of Entrapment

The law in this Circuit is clear that if there is sufficient evidence of initiation or inducement by a Government agent, the Government has the burden of proving that the defendant had a predisposition to commit the crime. United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952) (Hand, J.); United States v. Riley, 363 F.2d 955 (2d Cir. 1966). Compare United States v. Foster, 469 F.2d 1, 3 (1 Cir. 1972); United States v. Kadis, 373 F.2d 370, 373 n.4 (1 Cir. 1967). A defendant is not entitled to a charge on entrapment unless a) there has been evidence showing inducement or initiation by the Government and b) there is a factual question as to whether or not the defendant was predisposed to commit the crime.

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Thus, even if the Court were to find evidence of inducement by the Government, if it also finds that "the evidence of propensity [is] uncontradicted", then it is proper "to refuse to put the entrapment defense to the jury." United States v. Miley, Dkt. No. 74-2207, slip. op. 2363, 2380 (2d Cir., March 19, 1975). Indeed, if the evidence is overwhelming that the defendant "grasped at the opportunity" to commit the crimes charged, the issue of entrapment should not be presented to the jury. United States v. McMillan, 368 F.2d 810, 812 (2d Cir. 1966), cert. denied, 386 U.S. 909 (1967); United States v. Greenberg, 449 F.2d 369, 371-72 (2d Cir.), cert. denied, 404 U.S. 853 (1971); United States v. Hieves, 451 F.2d 836, 838 (2d Cir. 1971).

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

JAMES A. MOSS
Assistant United States Attorney

- Of Counsel -

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DEFENDANT'S REQUEST TO CHARGE

(pp. 16a-28a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

UNITED STATES OF AMERICA :

- v - :

76 Cr. 222 (RJW)

WILLIAM M. ORDNER, JR. :

Defendant. :

- - - - -x

DEFENDANT'S REQUESTS TO CHARGE

Charles J. Irwin
Attorney for Defendant,
William M. Ordner, Jr.

REQUEST NO. 1

The Nature of the Charges and Defenses

The Government has made its charges against the defendant Ordner in Six Counts.

In Count One it is charged that on September 25, 1975, Mr. Ordner possessed a firearm, a .25 caliber "Pen Gun" which was not identified by a serial number as required by law.

In Count Two it is charged that Mr. Ordner transferred that same pen gun illegally.

In response to these two charges, Mr. Ordner does not deny that he possessed and transferred the pen gun, but he does deny that he did so willfully and knowingly and says that he did not act voluntarily and purposefully, but made the transfer because he felt his life and safety and the safety of his family was in jeopardy, and further that he was entrapped. I shall explain the significance of these defenses later in my charge.

In Count Three it is charged that on October 16, 1975, Mr. Ordner possessed 502 .25 caliber pen guns, none of which were identified by serial number as required by law. Mr. Ordner denies that he ever possessed the alleged pen guns and states further that even if it could be found that he had possession

for some brief period, such possession was not willful and knowing because his actions were coerced and resulted from his fear for the life and safety of his family and himself.

In Count Four it is charged that Mr. Ordner illegally transferred the alleged 502 previously mentioned "penguins" without filing an application for such transfer and without paying a required transfer tax. Mr. Ordner, since he denies possession, denies any transfer of possession, and is essentially saying, since I never had them, I could not have transferred them. He further asserts that even if it could be found that he had possession for some brief period, such possession was not willful and knowing, for the reasons already given.

In Count Five and Six it is charged that Mr. Ordner possessed three destructive device type firearms and that he transferred said firearms illegally on or about November 8, 1975, without filing an application for such transfer and without paying a required transfer tax.

In response to these two charges, Mr. Ordner does not deny that he possessed and transferred the destructive devices but he does deny that he did so willfully and knowingly and says that he did not act voluntarily and purposefully but made the transfer because he felt his life and safety and the safety of his family was in jeopardy, and further, that he was entrapped.

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REQUEST NO. 2 (A through I)

Counts One and Two

(A) Count One charges violation of Title 26, United States Code, Section 5861(i), which provides:

"It shall be unlawful for any person. . .
(i) to receive or possess a firearm
which is not identified by a serial
number as required by [law]. . ."

(B) Count Two charges violation of Title 26, United States Code, Section 5861(e), which provides:

"It shall be unlawful for any person. . .
(e) to transfer a firearm in violation
of the provisions of this chapter. . ."

(C) The elements of the offenses charged in Counts One and Two are:

(1) The Government must prove that Mr. Ordner possessed a pen gun on or about September 25, 1975, and that he transferred that pen gun.

Mr. Ordner has admitted that as a fact, and it needs no further proof.

(2) The Government must prove that the pen gun is a firearm within the statutory definition.

Mr. Irwin has stipulated for the defense that it is a firearm as a matter of fact, and it needs no further proof.

(3) The Government must prove that Mr. Ordner's possession and transfer was willful and knowing.

(D) I instruct you that if you find as a matter of fact that Mr. Ordner's possession and transfer was not voluntary but was prompted by coercion or force brought to bear by government agents or those working with government agents, then you must find Mr. Ordner not guilty as to Counts One and Two.

(E) If you find that Mr. Ordner possessed and transferred the single pen gun because he was in fear for his life and safety and the life and safety of his family, and if that fear was caused by the actions of the Government and those working with and for the Government, and that fear was reasonable under the circumstances, then you must find Mr. Ordner not guilty.

(F) Mr. Ordner also raises the defense of entrapment.

(G) With respect to entrapment I instruct you that:

(1) The law enforcement agencies of the United States may not induce or lead an individual to commit a crime and then prosecute him for that crime.

(2) If you believe that treasury agents or anyone instructed by treasury agents induced Mr. Ordner to violate any section of any law, then he must not be found guilty.

(3) Entrapment occurs when the criminal design originates with the official of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they might prosecute.

(4) It is the responsibility of the defendant to raise the question of entrapment and to do so under the law, he must admit that the possession and transfer took place. He has done that.

(5) Once the question of entrapment is raised, as it has been in this case, the burden shifts to the Government, and it must prove beyond a reasonable doubt that it did not entrap Mr. Ordner. It is not the burden of the defendant to prove he was entrapped; it is the burden of the Government to prove beyond a reasonable doubt that he was not entrapped.

(H) As to Counts One and Two I instruct you that if you do not find beyond a reasonable doubt that Mr. Ordner acted knowingly, willfully and voluntarily as I have defined that, you must enter a judgment of acquittal as to those counts.

(I) As to Counts One and Two I instruct you that if you do not find that the Government has proved beyond a reasonable doubt that it did not entrap Mr. Ordner, then you must enter a judgment of acquittal as to those counts.

REQUEST NO. 3 (A through F)

Counts Three and Four

(A) In order to find that Mr. Ordner committed the offenses charged in Counts Three and Four, you would need to find that the Government has proved beyond a reasonable doubt

(1) That Ordner had possession of one or more of the 502 alleged pen guns;

(2) That the pen guns were firearms within the statutory definition;

(3) That said devices were not identified by serial numbers;

(4) That Ordner transferred them to someone else;

(5) That Ordner's actions were knowing and willful.

(B) Obviously if Ordner never possessed the devices, he could not have transferred them. Accordingly, an essential element of both counts is possession.

(C) With respect to what constitutes possession I charge you as follows:

(1) Where a person knowingly has direct physical control over a thing at a given time, he is in actual possession.

(2) Constructive possession exists where a person is not in actual possession but knowingly has both the power and

and intention at any given time to exercise dominion and control.

(3) In order to establish constructive possession, the Government must produce evidence showing ownership, dominion or control over the contraband itself or the premises or vehicle in which the contraband is concealed.

(4) Additionally, proof of mere physical presence at the scene or proximity to the thing in question is alone insufficient to establish either actual or constructive control.

(5) Mere knowledge of the physical location is also insufficient to prove possession.

(6) Merely showing that appellant was a passenger in the car and in proximity to the thing is, without more, insufficient to support a finding of possession.

(D) The Government is also required to prove beyond a reasonable doubt that Ordner possessed complete firearms as defined by the act. Possession of a part of a firearm, such as a barrel or trigger or stock, is not a violation of any law. The possession, if any, must be of a complete operable firearm.

(E) If you find that the Government failed to prove beyond a reasonable doubt that Ordner had possession of one or more of the 502 alleged pen guns, you must enter a judgment of acquittal as to Counts Three and Four.

(F) I instruct you that, even if you find that the Government has sustained its burden of proof as to possession, you must still deal with the question of whether such possession was knowing and willful. In this regard I remind you that:

(1) If you find as a matter of fact that Mr. Ordner's possession and transfer was not voluntary but was prompted by coercion or force brought to bear by government agents or those working with government agents, then you must find Mr. Ordner not guilty as to Counts Three and Four.

(2) If you find that Mr. Ordner possessed and transferred the single pen gun because he was in fear for his life and safety and the life and safety of his family, and if that fear was caused by actions of the Government and those working with and for the Government, and that fear was reasonable under the circumstances, then you must find Mr. Ordner not guilty.

REQUEST NO. 4 (A through I)

Counts Five and Six

(A) Count Five charges violation of Title 26, United States Code, Section 5861(i), which provides:

"It shall be unlawful for any person. . .
(i) to receive or possess a firearm
which is not identified by a serial
number as required by [law]. . ."

(B) Count Six charges violation of Title 26, United States Code, Section 5861(e), which provides:

"It shall be unlawful for any person. . .
(e) to transfer a firearm in violation
of the provisions of this chapter. . ."

(C) The elements of the offenses charged in Counts Five and Six are:

(1) The Government must prove that Mr. Ordner possessed a destructive device on or about October 16, 1975, and that he transferred that destructive device.

Mr. Ordner has admitted that as a fact, and it needs no further proof.

(2) The Government must prove that the destructive device is a firearm within the statutory definition.

Mr. Irwin has stipulated for the defense that it is a firearm as a matter of fact, and it needs no further proof.

(3) The Government must prove that Mr. Ordner's possession and transfer was willful and knowing.

(D) I instruct you that if you find as a matter of fact that Mr. Ordner's possession and transfer was not voluntary but was prompted by coercion or force brought to bear by government agents or those working with government agents, then you must find Mr. Ordner not guilty as to Counts Five and Six.

(E) If you find that Mr. Ordner possessed and transferred the destructive device because he was in fear for his life and safety and the life and safety of his family, and if that fear was caused by the actions of the Government and those working with and for the Government, and that fear was reasonable under the circumstances, then you must find Mr. Ordner not guilty.

(F) Mr. Ordner also raises the defense of entrapment.

(G) With respect to entrapment I instruct you that:

(1) The law enforcement agencies of the United States may not induce or lead an individual to commit a crime and then prosecute him for that crime.

(2) If you believe that treasury agents or anyone instructed by treasury agents induced Mr. Ordner to violate any section of any law, then he must not be found guilty.

(3) Entrapment occurs when the criminal design originates with the official of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they might prosecute.

(4) It is the responsibility of the defendant to raise the question of entrapment and to do so under the law, he must admit that the possession and transfer took place. He has done that.

(5) Once the question of entrapment is raised, as it has been in this case, the burden shifts to the Government, and it must prove beyond a reasonable doubt that it did not entrap Mr. Ordner. It is not the burden of the defendant to prove he was entrapped; it is the burden of the Government to prove beyond a reasonable doubt that he was not entrapped.

(H) As to Counts Five and Six I instruct you that if you do not find beyond a reasonable doubt that Mr. Ordner acted knowingly, willfully and voluntarily as I have defined that, you must enter a judgment of acquittal as to those counts.

(I) As to Counts Five and Six I instruct you that if you do not find that the Government has proved beyond a reasonable doubt that it did not entrap Mr. Ordner, then you must enter a judgment of acquittal as to those counts.

REQUEST NO. 5

With respect to Counts Three and Four, the defense contends among other things that it was the Government, not Mr. Ordner, who supplied the flare guns which were the working parts of the alleged firearms.

Once the defense comes forward with evidence that the Government was in fact the supplier, the prosecution bears the burden of proving beyond a reasonable doubt either:

- (1) that the Government was not the supplier, or
- (2) that the defendant would have obtained the devices elsewhere to complete the transaction.

I charge you that the defense has in fact produced evidence that the Government was the supplier of the operating parts of these devices. Therefore, the burden is theirs to prove they were not the supplier, beyond a reasonable doubt, or that Ordner would have obtained the devices elsewhere.

DEFENDANT'S SUPPLEMENTAL REQUESTS TO CHARGE
(pp. 29a-33a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

- v - :

76 Cr. 222 (RJW)

WILLIAM M. ORDNER, JR. :

Defendant. :

-----X

DEFENDANT'S SUPPLEMENTAL REQUESTS TO CHARGE

Charles J. Irwin
Attorneys for Defendant,
William M. Ordner, Jr.

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REQUEST NO. 6

Since every crime requires a voluntary mind, it is a defense to a criminal charge that the criminal act was not committed voluntarily, but was the result of coercion, compulsion or necessity.

The term necessity has various meanings in the law, but in the sense of a defense of a crime, it has a general meaning of some unavoidable circumstances, condition or fact which leaves no choice of action in the mind of the actor.

In order to excuse a criminal act on the grounds of coercion, compulsion or necessity, one must have acted under the apprehension of immediate and impending death or serious and immediate bodily harm to himself or a member of his immediate family.

If you believe from the evidence that the defendant Ordner committed the acts that the Government charges as criminal acts, under a well-founded apprehension of immediate death or serious bodily injury to himself or to members of his immediate family, to be inflicted by Mr. S (Mr. Stagg) or those working with him, as representatives of organized crime, then you would be warranted in finding that the defendant committed acts under coercion and compulsion, and under these circumstances,

it would be your duty under the law to return a verdict of not guilty.

D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951) cert. denied, 343 U.S. 935 (1952).

Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950).

REQUEST NO. 7

The law imposes criminal liability upon one who aids and abets the commission of a crime by another, that termed the principal. In order to find the defendant aided and abetted the commission of the crime charged in the Third Count of the Indictment, you must find the following:

First, you must find beyond a reasonable doubt, that the defendant voluntarily associated himself with the criminal venture and voluntarily participated in it as something he wished to bring about and as something he sought by his action to make succeed.

Second, you must find that the principals committed the crime alleged beyond a reasonable doubt, and were capable of so doing. Since the principals in this case, undercover Government agents, have not been convicted of the crime, you must find beyond a reasonable doubt from the record before you that they in fact committed the crime charged and could be prosecuted therefor.

If you cannot find beyond a reasonable doubt both that Mr. Ordner voluntarily participated in the criminal venture, making its object his own and that the undercover agents committed the crime charged, then you must find Mr. Ordner not guilty of aiding and abetting the crime charged in the Third Count.

REQUEST NO. 7 (Continued)

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Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265-66 (1962);
United States v. Cades, 495 F.2d 1166, 1167 (3rd Cir. 1974);
United States v. Martinez, 479 F.2d 824, 829 (1st Cir. 1973);
Roth v. United States, 339 F.2d 863, 865 (10th Cir. 1964); Edwards
v. United States, 286 F.2d 681, 683 (5th Cir. 1960); Colosacco v.
United States, 196 F.2d 165, 167 (10th Cir. 1952); Karrell v.
United States, 181 F.2d 981, 985 (9th Cir.), cert. denied, 340
U.S. 981 (1950); United States v. Peoni, 100 F.2d 401, 402 (2nd
Cir. 1938); United States v. Howitt, 55 F.Supp. 372, 374 (S.D.
Fla. 1944), aff'd, 150 F.2d 82 (5th Cir. 1945), aff'd, 328 U.S.
189 (1945).

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GOVERNMENT'S REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(pp. 34a-77a)

-----X
UNITED STATES OF AMERICA :

- v - :

76 Cr. 222 (RJW)

WILLIAM M. ORDNER, JR. :

Defendant. :

-----X
GOVERNMENT'S REQUESTS TO CHARGE

The Government respectfully requests the Court
to include the following in its instructions to the jury:

REQUEST NO. 1The Indictment

The indictment in this case contains six counts, or charges. Count One charges that on or about September 25, 1975, the defendant possessed a firearm --a .25 caliber "Pen Gun" -- which was not identified by a serial number as required by law. Count Two charges that on or about the same date, September 25, 1975, defendant transferred this "Pen Gun" illegally, in that he had not filed an application with the Secretary of the Treasury or his delegate for the transfer and registration of the "Pen Gun", he had not paid the required transfer tax and he had not obtained the written approval of the Secretary of the Treasury authorizing the transfer. Count Three charges that on October 16, 1975, the defendant possessed 502 .25 caliber "Pore Guns", none of which were identified by serial number as required by law. Count Four charges that the transfer of the 502 "Pen Guns" was illegal for the same reasons I mentioned in connection with Count Two: that is, that the defendant had not filed an application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearms, he had not paid the required transfer tax, and he had not obtained the written approval of the Secretary of the

REQUEST NO. 1 (Continued)

- 2 -

Treasury authorizing the transfer.

Count Five charges that on or about November 8, 1975, the defendant possessed three destructive device - type firearms -- three Green Pineapple - type Hand Grenades --which were not registered to him in the National Firearms Registration and Transfer Record. Count Six charges that on or about the same day, November 8, 1975, the defendant illegally transferred these hand grenades. It is again charged that this transfer was illegal in that the defendant had not filed an application with the Secretary of the Treasury or his delegate for the transfer and registration of these hand grenades, he had not paid the required transfer tax and he had not obtained the written approval of the Secretary of the Treasury authorizing the transfer.

REQUEST NO. 2

Counts One and Three: The Statutes

Let us now turn to the specific charges against the defendant. The first and third counts charge the defendant with violating Title 26, United States Code, Section 5861(1), which provides:

"It shall be unlawful for any person...
(1) to receive or possess a firearm
which is not identified by a serial
number as required by [law]..."

The statute which sets forth the requirements for serial-number identification reads, in relevant part, as follows:

"Each manufacturer... and anyone making a
firearm shall identify each firearm...
manufactured...or made by a serial
number which may not be readily removed,
obliterated, or altered..."

(Title 26, United States Code, Section
5842(a).)

"Any person who possesses a firearm...
which does not bear [his] serial number...
shall identify the firearm with a serial
number assigned by the Secretary [of the
Treasury] or his delegate ..."

(Title 26, United States Code, Section
5842(b).)

Thus, reading all of these provisions of law together, it is charged in Counts One and Three that the defendant unlawfully possessed certain firearms that did not bear serial numbers and for which the defendant had not obtained serial numbers from the Department of the Treasury.

REQUEST NO. 3

Counts One and Three: Elements of Offense

In order to find that the defendant committed the offenses charged in Counts One and Three, you must find beyond a reasonable doubt each of the following three elements:

First: That on or about the dates mentioned in these counts, the defendant had possession of one or more "firearms," as that term will be defined to you by me in a moment.

Second: That the "firearms" possessed were not identified by serial numbers as required by laws.

Third: That the defendant possessed the firearms willfully and knowingly.

REQUEST NO. 4

Counts One and Three: Definition of "Firearm"

As I have already instructed you, Counts One and Three charge that the defendant illegally possessed certain "Pen Guns" that did not bear serial numbers as required by law. You will recall that the statutes I read to you made it unlawful to possess "firearms" that did not bear serial numbers. It is for you to determine if the "Pen Guns" referred to in Counts One and Three are "firearms" as that term is used in the statutes.

The pertinent part of the definition of "firearm" set forth in the statute is as follows:

"...any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive..."

(Title 26, United States Code, Section 5845 (e).

REQUEST NO. 5

Counts One and Three: First Element

The first element of Counts One and Three is that the defendant possessed the firearm(s) described in the indictment --.25 caliber "Pen Guns."

The word "possess" has its everyday common meaning, that is, to have something within one's physical control.

REQUEST NO. 6

Counts One and Three: Second Element

The second element of the offenses charged in Counts One and Three is that the "Pen Guns" which the defendant is charged to have possessed were not identified by serial numbers as required by law.

The evidence in this case includes a certificate showing that after a diligent search of all of the records maintained in the North-Atlantic Region of the Bureau of Alcohol, Tobacco and Firearms relative to serial number identifications of firearm, it was determined that William M. Ordner never applied with the Department of the Treasury to have serial numbers issued for the "Pen Guns" referred to in the indictment. You have heard testimony that the "Pen Guns" did not have serial numbers on them on the dates referred to in the indictment. From such evidence, if you find it credible, you may find that the Government has sustained its burden of proving beyond a reasonable the defendant Ordner did not identify the "Pen Guns" in question by serial numbers as required by law.

REQUEST NO. 6 (Continued)

- 2 -

United State v. Stevens, 509 F. 2d
683, 685 (8th Cir.), cert. denied,
421 U.S. 989 (1975); United States
v. White, 368 F. Supp. 470, 472
(N.D. Ind. 1973), aff'd., 498 F. 2d
1404 (7th Cir. 1974); Robbin v.
United States, 476 F. 2d 26, 29
(10th Cir. 1973); United States v.
Williams, 446 F. 2d 486, 489 (5th
Cir. 1971).

REQUEST NO. 7

Counts One and Three: Third Element.

You must also find beyond a reasonable doubt that the defendant acted wilfully and knowingly. What do these terms "wilfully and knowingly" mean?

An act is done "knowingly" if it is done voluntarily and purposely and not because of mistake, an accident, mere negligence or other innocent reason. An act is "wilfull" if it is done knowingly and deliberately.

In determining whether the defendant acted wilfully it is not necessary for the Government to establish that the defendant knew that he was breaking any particular law.

See American Surety Co. v. Sullivan,
7 F. 2d 605, 605 (2d Cir. 1925);
United States v. Byrd, 352 F. 2d
572 n.1 (2d Cir. 1965).

Furthermore, it is not necessary for the Government to establish that the defendant knew the objects he possessed had the characteristics that made it necessary for them to bear serial numbers. It need only be established that the defendant knew he possessed an object or objects which were firearms within the very general sense by which

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REQUEST NO. 7 (Continued)

- 2 -

that term is known.

See United States v. Freed, 401 U.S. 601, 607-610 (1971); United States v. Vasquez, 476 F. 2d 730 (5th Cir. 1973), cert. denied, 414 U.S. 836 (1974); United States v. Romero, 484 F. 2d 1324, 1328 (10th Cir. 1973).

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REQUEST NO. 8Proof of Knowledge and Intent

While the requisite knowledge and intent must be shown, I instruct you that direct testimony to prove this knowledge and intent is not necessary. Knowledge and intent involve a person's state of mind, which must be determined by reasonable inference from the facts proved. It is obviously impossible to ascertain or prove directly what was the operation of the mind of the defendant on the date on which it is alleged the offense charged in the indictment was committed. You cannot see inside his head and know what his thoughts are now and, of course, you cannot know what his thoughts were then. But you can judge the knowledge and intention of the defendant from a consideration of his conduct and statements and all the facts and circumstances that you have heard.

From the charge of Judge Noonan, affirmed in United States v. Cordo, 186 F.2d 144 (2d Cir. 1951).

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REQUEST NO. 9

Counts Two and Four: The Statute
Counts Two and Four of the indictment, charge
the defendant with violating Title 26, United States Code,
Section 5861(e) which provides that:

"It shall be unlawful for any person --

(e) To transfer a firearm in violation
of the provisions of this chapter . . ."

Included among the provisions of "this chapter" are Sections
5811 and 5812 of Title 26, United States Code.

Section 5811 relating to transfer taxes provides
as follows:

"(a) RATE. -- There shall be levied,
collected, and paid on firearms trans-
ferred a tax . . .

(b) BY WHOM PAID. -- The tax imposed
by subsection (a) of this section shall
be paid by the transferor.

(c) PAYMENT. -- The tax imposed by
subsection (a) of this section shall
be payable by the appropriate stamps
prescribed for payment by the Secre-
tary [of the Treasury] or his delegate."

Section 5812 provides in part as follows:

"(a) APPLICATION. -- A firearm shall
not be transferred unless (1) the trans-
feror of the firearm has filed with the
Secretary [of the Treasury] or his del-
egate a written application, in duplicate,
for the transfer and registration of the
firearm to the transferee on the applica-
tion form prescribed by the Secretary or

Counts Two and Four: The Statute

his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form . . . and (6) the application form shows that the Secretary [of the Treasury] or his delegate has approved the transfer and the registration of the firearm to the transferee."

Counts Two and Four charge the defendant with transferring firearms -- the "Pen Guns" -- without paying the transfer tax imposed under Section 5811 or filing the application or obtaining the written approval required by Section 5812.

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REQUEST NO. 10

Counts Two and Four: Elements
of the Offense

In order to find the defendant guilty of illegally transferring the "Pen Guns" as charged in Counts Two and Four, it is necessary for you to find beyond a reasonable doubt each of the following three elements:

First: That on or about the dates set forth in each of these counts, the defendant transferred a "firearm" or "firearms" as that term has already been defined to you.

Second: That the transfer was in violation of law because the defendant had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearms, or that he had not paid the transfer tax by placing the proper stamp on the application form, or that he had not obtained the approval of the Secretary of the Treasury or his delegate -- written on the application form -- for the transfer and registration of the firearms.

Third: That the transfer of these firearms was wilful and knowing as those terms have already been defined.

REQUEST NO. 2Counts Two and Four: First Element

The first element which the Government must establish as to Counts Two and Four is that the defendant transferred firearms.

The term "firearm" as it applies to the second and fourth counts, has the same meaning as it did in the first and third counts. As in Counts One and Three, you must decide if the "Pen Guns" referred to in the second and fourth counts are "firearms."

The term "transfer" is defined as follows:

"(j) TRANSFER -- The term 'transfer' and various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of."
(Title 26, United States Code, Section 5845(j).)

REQUEST NO. 12

Counts Two and Four: Second Element

In order to establish that the defendant did not apply for authorization to transfer the "Pen Guns", or pay the transfer tax, or obtain written authorization for the transfer, the Government has introduced into evidence a certificate that after a diligent search of the relevant government files, no applications for the transfer of these "Pen Guns" by the defendant were found. I instruct you that you may conclude from this evidence beyond a reasonable doubt that the defendant never filed such an application for transfer, never paid the transfer tax and never obtained written authorization for the transfer.

United States v. Stevens, 509 F.2d 683, 685 (8th Cir.), cert. denied, 421 U.S. 939 (1975); United States v. White, 308 F. Supp. 470, 472 (N.D. Ind. 1973), aff'd., 498 F.2d 1404 (7th Cir. 1974); Robbin v. United States, 476 F.2d 26, 29 (10th Cir. 1973); United States v. Williams, 446 F.2d 486, 489 (5th Cir. 1971).

I further charge that you may find the defendant guilty of the charges in Counts Two and Four if you find beyond a reasonable doubt all of the other elements of the charge and, as to this element, that the defendant either did not file the application for transfer, or did not pay the transfer tax, or did not obtain the proper written approval for the transfer. It is not necessary for you to

REQUEST NO. 12

(Continued)

-2-

Counts Two and Four: Second Element

find that he failed to do all three of these things; the failure to do just one of them will be sufficient to support a verdict of guilt.

REQUEST NO. 13

Counts Two and Four: Third Element

The third element that the Government must prove to your satisfaction beyond a reasonable doubt is that the defendant transferred the "Pen Guns" knowingly and wilfully. I have already explained to you what these terms mean, and they have the same meaning in Counts Two and Four that they had in Counts One and Three.

Let me again remind you that in determining whether the defendant acted wilfully, it is not necessary for the Government to establish that the defendant knew he was breaking any particular law.

REQUEST NO. 14Count Five: The Statute

The last two counts -- Counts Five and Six -- relate to three Pineapple-type hand grenades which, it is charged, the defendant possessed and then transferred unlawfully on or about November 8, 1975.

In Count Five of the indictment the defendant is charged with having violated Title 26, United States Code, Section 5861(d) which, in part, provides that:

"It shall be unlawful for any person --

(d) to . . . possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record. . . ."

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REQUEST NO. 15

Count Five: Meaning of the Statute

The fifth count of the indictment charges defendant with violating a part of the National Firearms Act, which makes it unlawful for any person to possess a firearm which is not registered to him in the National Firearms Registration & Transfer Record. 26 U.S.C. § 5861(d). Congress has provided for a central registry of all firearms in the United States which are not under the control of the government. This central registry is called the National Firearms Registration & Transfer Record, which I will refer to as "The Registry."

The information in the Registry includes identification of the firearm, usually by serial number, date of registration and name and address of the person who is entitled to possession of the firearm. It is required that each maker or importer shall register in the Registry each firearm he makes or imports. It is also required that whenever a firearm is transferred, the person who transfers it -- and that person is called the transferor -- must register the firearm in the Registry to the person to whom it is transferred, and that person is called the transferee.

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REQUEST NO. 15

(Continued)

-2-

Count Five: Meaning of the Statute

The transferor must file an application for the transfer and registration to the transferee. The application includes, among other things, the fingerprints and photograph of the transferee. If the transfer is authorized, the authorization automatically changes the registration of the firearm to the transferee.

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REQUEST NO. 16Count Five: Elements of Offense

In order to find that the defendant committed the offense charged in Count Five, you must find beyond a reasonable doubt each of the following three elements:

First: That on or about November 8, 1975, defendant had possession of a "firearm," as that term will be defined to apply to "destructive devices."

Second: That the firearms possessed were not then registered to him in the National Firearms Registration and Transfer Record.

Third: That his possession of these firearms was wilful and knowing.

REQUEST NO. 17

Count Five: Definition of "Firearm"

The "firearms" referred to in Counts Five and Six are Green Pineapple-type hand grenades. The relevant language in the definitional statute that applies to such devices is from the section that defines "destructive devices." That section reads as follows:

"The term 'destructive device' means any explosive . . . grenade . . ."
(Title 26, United States Code, Section 5845(f)(1). . .)

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REQUEST NO. 18

Count Five: First Element

The first element of Count Five is that the defendant possessed the firearms described in Count Five of the indictment -- three Pineapple-type Hand Grenades.

As I have already instructed you, the word "possess" has its everyday common meaning, that is, to have something within one's physical control.

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REQUEST NO. 19

Count Five: Second Element

The evidence in this case includes a certificate showing that after diligent search of the National Firearms Registration and Transfer Record, no record was found that the hand grenades which the government claims were involved in this case were registered to the defendant. As I have previously told you, from such evidence you may find that the Government has sustained its burden of proving non-registration of the firearms beyond a reasonable doubt.

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REQUEST NO. 20Count Five: Third Element

The third element -- that the defendant possessed the hand grenades wilfully and knowingly -- has already been explained to you. "Wilfully and knowingly" has the same meaning in Count Five and that it had in Counts One through Four.

Again, I instruct you that the requirement of proving that defendant acted knowingly does not make it necessary for the Government to show that defendant knew about the registration provisions of the law or that he knew the hand grenades had physical characteristics that might make them subject to registration.

United States v. Gardner, 448 F.2d 522 (9th Cir. 1971); United States v. Cowper, 503 F.2d 130 (6th Cir. 1974), cert. denied, 420 U.S. 930 (1975).

In this last regard, if you find that the defendant did possess the hand grenades, it is only necessary for you to find that the defendant knew that they were hand grenades.

United States v. Freed, 401 U.S. 601, 607-610 (1971); United States v. DePugh, 201 F. Supp. 437 (D.C. Mo. 1967), rev'd on other grounds, 401 F.2d 346 (6th Cir. 1968).

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REQUEST NO. 21Count Six: Elements of Offense

Count Six charges the defendant with having transferred, unlawfully, three Pineapple-type hand grenades. It is charged that the transfer of those hand grenades was unlawful for the same reasons that the transfers in Counts Two and Four were charged to be unlawful. The applicable law is the same as that which I explained to you in connection with Counts Two and Four. Again, I charge you that in order to find that the defendant committed the offense charged in Count Six you must find beyond a reasonable doubt, each of the following three elements:

First: That on or about the date set forth in the indictment, the defendant transferred "firearms" as that term has already been defined for you in connection with the definition of "destructive device."

Second: That the transfer was in violation of law because the defendant had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearms; or that he had not paid the transfer tax by placing the proper stamp on the application form, or that he had not obtained the approval of the Secretary of the Treasury or his delegate -- written on the application form -- for the transfer and registration of the firearms.

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COUNTY KING ELEMENTS OF OFFENSE

Third. That the transfer of these firearms was
without and knowing as those terms have already been de-
scribed.

REQUEST NO. 22

Use of Informant

Now, there has been testimony before you with respect to the use by agents of the Bureau of Alcohol, Tobacco and Firearms of the services of an informant or an informer. Whatever one thinks of informers, the Government uses them in order to get leads about those who are violating the law. Whether one disapproves of this is really beside the point, provided that such services do not impinge upon the rights of the defendant, because the use of such services is not forbidden by law. You are not being asked to determine whether or not you agree with the policy endorsing the use of informants.

Putting it another way, if you are satisfied beyond a reasonable doubt, as I have already defined reasonable doubt to you, that on the dates and at the places with which we are concerned, the defendant committed the offenses charged in the information, you must find him guilty even though you believe his apprehension came about in some measure by the Government availing itself of the services of an informant.

Charge of the Court in United States
v. Orza, aff'd, 320 F.2d 576 (2d Cir.
1963).

Expert Testimony

"The general rule is that witnesses are permitted to testify only as to facts and may not express their opinions. The exception to this rule is the opinion of a qualified expert on some particular technical matter. The expert may testify as to his opinion on a subject concerning which he has special knowledge. This is allowed on the theory that the advice of one experienced and versed in technical or special subjects will aid the jury.

"You may consider the expert's qualifications and opinion; weigh his reasons, if any, and give his testimony such weight as you feel it deserves. As previously stated expert opinion is purely advisory and you may reject it entirely if in your judgment the reasons given for it are not convincing or sound. The determination herein will not go out with the experts."

on charge of Honorable Henry W.
Bodden, U. S. District Judge, in
the case of United States v. Alger
1981 Jan 20, 1981. See also label
4. American Airlines 201 C.2. 327
1981 Jan 20, 1981. See also label
1981 Jan 20, 1981. See also label

REQUEST NO. 24

Uncalled Witness (If Applicable)

If a potential witness could have been called by the Government or by the defendant and neither side called him, then you may infer that the testimony of the absent witness might have been unfavorable either to the Government or to the defendant or both of them. But on the other hand, it is equally within your province to draw no inference at all from the failure of either side to call a witness.

United States v. LaRocca, 224 F.2d 359, 861 (2d Cir. 1955); United States v. DiBrizzi, 393 F.2d 642, 646 (2d Cir. 1968); United States v. Evanchik, 413 F.2d 950, 953 (2d Cir. 1969); United States v. Crisona, 416 F.2d 107, 113 (2d Cir. 1969).

You should bear in mind, however, that there is no duty upon either side to call a witness whose testimony would be merely cumulative of testimony already in evidence.

United States v. Antonelli Fireworks Co., 155 F.2d 631, 638-39 (2d Cir.), cert. denied, 329 U.S. 742 (1946).

REQUEST NO. 25

Entrapment (If Applicable)

The defendant asserts as a defense to the charge that he was the victim of entrapment by an agent of the Government.

The word "entrapment" that I have just used is a legal term. It has a technical meaning, not that of popular speech or colloquial, ordinary usage. Therefore I must explain the word and meaning of "entrapment" as it is used in the law.

Criminal activity is such that sometimes stealth and strategy are necessary methods to be used by law enforcement officers.

The function of law enforcement is not only the prevention of crime but also the detection and apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. The defense of entrapment is based upon the policy of the law not to ensnare or entrap innocent persons into the commission of a crime. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal.

Entrapment (If Applicable)

A basic feature of entrapment is that the idea or design of committing the crimes originated with a law enforcement officer rather than with a defendant; that the defendant had no disposition, intent or purpose to commit the alleged offenses; and that the law enforcement officer or Government employee implanted in the mind of an innocent person the disposition to commit the alleged offense and instigated and incited its commission in order that the defendant might be arrested and prosecuted.

If you find that an agent or employee of the Government merely afforded a favorable opportunity or facilities to the defendant for the commission of the alleged crime, such conduct on the part of the Government does not constitute entrapment. Entrapment would occur only if you find that the defendant lacked the predisposition to commit the alleged offenses and that the Government agent actually implanted the criminal design in the mind of the defendant.

If you find any credible evidence creating the reasonable possibility that a Government agent or employee instigated and incited or otherwise induced the defendant to commit the crimes charged, then the Govern-

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ment must prove beyond a reasonable doubt that such inducement was not the cause or creator of the crime, that is, that the defendant had been pre-disposed and willing to commit the crimes.

Adapted from the charge of the Hon.
William P. Merlands in United States
v. Bowe et al., 65 Cr. 189, aff'd,
360 F.2d 1 (2d Cir. 1966), cert.
denied, 385 U.S. 961 (1966), and the
charge of the Hon. Inzer B. Wyatt,
in United States v. Flynn, 74 Cr.
1157, at 217 et seq., aff'd without
opinion, 381 F.2d 1000 (2d Cir.
Nov. 24, 1967).

REQUEST NO. 25 (Cont'd)

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Entrapment (If Applicable)

See Hampton v. United States, 44
U.S.L.W. 4542 (April 27, 1976); United
States v. Russell, 411 U.S. 423 (1973);
United States v. Guidice, Docket No.
34127 (2d Cir. April 29, 1970), Slip.
Op. 2568-2571; see also Model Penal
Code, Section 2.13(2) (1962) and Com-
mentary, Tentative Draft 9, pp. 20, 21
(1959); N.Y. Penal Law, Section 25.00,
40.05.

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REQUEST NO. 26Defendant's Testimony (If Applicable)

In this case, the defendant has taken the stand and testified in his own behalf. He was under no obligation to do so. But, of course, any defendant may testify if he so chooses. By testifying in the case, the defendant became a witness whose credibility is for you to judge along with the credibility of all the other witnesses. It is proper for you to consider the deep personal interest which every defendant has in the outcome of a criminal proceeding against him in weighing his innocence and in determining how far and to what extent his testimony is worthy of belief.

The interest of the defendant in the result of this trial is of a character possessed by no other witness and is therefore a matter which may seriously affect the credence that should be given to his testimony.

Defendant's Testimony (If Applicable)

Adapted from the charge of the
Honorable Richard H. Levet in:

United States v. Tufaro; p. 37a of
the Appellant's Appendix, aff'd per
curiam, 316 F.2d 240 (2d Cir.), cert.
denied, 375 U.S. 822 (1963);

Reagan v. United States, 157 U.S.
301 (1895).

See also the charge of the Honorable
Gregory F. Noonan in:

United States v. William Walter
Remington, at p. 4016 of Record
on Appeal, rev'd on other grounds,
Remington v. United States, 191 F.2d
246 (2d Cir. 1953).

REQUEST NO. 27Protection of the Public

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal. But on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this.

From the charge in United States v. Witt, 215 F.2d 580, 584 (2d Cir. 1954), cert. denied sub nom. Talanker v. United States, 348 U.S. 887.

This charge was also approved in United States v. Hiss, 185 F.2d 822, 833 (2d Cir. 1954), cert. denied, 340 U.S. 948.

REQUEST NO. 28

Possible Punishment

Now, under your oath as jurors you cannot allow consideration of the punishment which may be inflicted upon the defendant, if convicted, to influence your verdict in any way or in any sense enter into your deliberations.

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The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

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You are to decide the case upon the evidence, and the evidence alone, and you must not be influenced by any assumption, conjecture, or sympathy, or any inference not warranted by the facts until proven to your satisfaction.

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Adapted from Judge Weinfeld's charge
in United States v. Bruswitz, aff'd,
219 F.2d 62, 63-63 (2d Cir.).
cert. denied, 349 U.S. 912 (1955).

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REQUEST NO. 29

Sympathy

Let me remind you once again of the obligation which you undertook, an obligation supported by your oath, to dismiss from your mind every trace of prejudice, bias or sympathy. The emotions are not helpful in the determination of judicial questions. This is a court of justice and a court of law. Your function is to find facts, to determine facts. You are not helped in the discharge of that duty by giving vent or permitting yourself to be swayed by prejudice, bias or by sympathy.

Adapted from the charge of Judge
Rifkind in United States v. DeNormand,
aff'd, 149 F.2d 622 (2d Cir. 1945).

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REQUEST NO. 30

General Requests

In addition to the foregoing, the Government respectfully requests that the Court give its usual instructions to the jury on the following matters:

- a. Indictment not evidence.
- b. Burden of proof and reasonable doubt.
- c. Jury's province to find the facts.
- d. Jury's recollection controls.
- e. Verdict must be unanimous.
- f. Credibility of witness.
- g. Direct and circumstantial evidence.
- h. Right to see the exhibits and have testimony read.
- i. Character evidence (if applicable).

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Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

JAMES A. MOSS
Assistant United States Attorney

- Of Counsel -

NEW YORK STATE
No. 43-662033
Qualified in Richmond Co.
Comm. Expires March 30, 1977

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DEFENDANT'S POST-VERDICT MOTION
(pp. 78a-86a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :
-v- : 76 Cr. 222 (RJW)
WILLIAM M. ORDNER, JR. :
Defendant. :
-----x

DEFENDANT'S POST-VERDICT MOTION

Charles J. Irwin
Attorney for Defendant,
William M. Ordner, Jr.

The defense moves this honorable Court to enter a judgment of acquittal, notwithstanding the verdict of the jury entered in the above-captioned matter on the grounds that:

(a) The verdict of the jury was contrary to the weight of evidence;

(b) The jury verdict as respects Counts 1 and 2 constitutes the kind of inconsistent verdict which goes beyond inconsistent findings based upon similar or same facts but, instead, indicates a failure by the jury to comprehend the facts before it and the defenses as charged by the Court in its charges to the jury;

(c) The verdict constitutes a compromise verdict based neither upon the facts adduced nor the law as pronounced by the Court, but is based upon a confusion and fatigue of the jury;

(d) The conviction is void as it is based upon an indictment which was substantively amended during trial without Grand Jury action and over the objection of the defense;

(e) The jury's deliberation on all Counts was prejudiced and confused by the introduction of voice tapes which were introduced without proper foundation, without relevancy, and over the objection at every step of the procedure, of the defense.

This case was presented originally by the United States on the basis of an indictment issued by a Grand Jury in Six Counts.

Count 1 alleged that Defendant Ordner possessed one pen gun contrary to statute.

Count 2 alleged that Ordner transferred that pen gun contrary to statute.

Count 3 alleged that Ordner possessed 502 other pen guns contrary to statute.

Count 4 alleged that Ordner transferred said 502 pen guns contrary to statute.

Count 5 alleged that Ordner possessed 3 hand grenades contrary to statute.

Count 6 alleged that Ordner transferred said hand grenades contrary to statute.

Early in the Government's case, the Assistant U.S. Attorney sought admission into evidence of a voice recording which was a two hour conversation between Defendant Ordner and two law enforcement agents working undercover.

The defense objected on various grounds, including the failure of a proper foundation and relevancy of the material in the recording to the crimes charged by the indictment, particularly in view of the fact that it was the defense position that the Government could not prove possession of the 502 pen guns as charged in

Count 3, and without possession there could be no transfer of the 502 pen guns as charged in Count 4. The Court overruled defense objections to the use of the recording and of a transcript of that recording after requesting an offer of proof from the Government. The Government in that offer made certain representations with respect to their ability to prove possession of the 502 pen guns and the transfer of said pen guns by the Defendant. Based upon the Government's representations, the Court permitted the recording to be played and permitted the jury to read a transcript of said recording. This evidence clearly became the central thrust of the Government's case.

Subsequently it became clear that the Government had no proof of transfer by the Defendant of the 502 pen guns, and that Count was properly dismissed by the Court. It also became clear that the Defendant had never possessed the 502 pen guns. However, in that instance the Government was permitted, over the objection of the defense, to amend the indictment to change Count 3 from a Count alleging possession of 502 pen guns by Ordner to a Count alleging that Ordner aided and abetted the Government agents in possessing said 502 pen guns.

The amendment of Count 3 of the indictment constituted a substantive amendment and could not under the law be accomplished without returning the indictment to the Grand Jury for further action. In this instance amending the indictment to an aiding and abetting indictment

was not a mere technical amendment but, in fact, changed the substantive elements of the crime. This is true because the proofs indicate that the 502 pen guns consisted each of two parts--the working part or trigger mechanisms or "flare guns" as they were referred to in the trial were never possessed by Ordner, but were at all times in the possession and control of the Government agents. The only portion of the guns which Ordner could have been said to have possessed are the barrels, and that possession, in and of itself, is legal. Before Ordner could be said to aid and abet the Government agents in the possession of the 502 pen guns, the pen guns would have to be in existence, since one cannot possess what does not exist. Therefore, the pen guns had to be manufactured. The manufacturing of a firearm is a clear and distinct crime separable and different from the possession of a firearm. What occurred, according to the Government testimony, is that after Ordner delivered barrels, the barrels were screwed onto the flare guns and, in that process, firearms were manufactured. At that point both the flare guns and the barrels were in the possession of the Government agents and not in the possession of Ordner. They (the Government agents) manufactured firearms. Such manufacture could be said, under proper proofs and under a proper indictment, to have been aided and abetted by Ordner, but that crime was not

charged. Accordingly, the amendment of the indictment was, indeed, a substantive amendment. There could be no proof that Ordner aided and abetted the possession. There might be proof that Ordner aided and abetted manufacture. The possession by the Government agents was complete when the manufacture was complete.

In view of the fact that the indictment was substantively amended, the conviction should be voided.

In addition, it must be noted that if the amendment to the indictment was a substantive amendment, and, therefore, was clearly precluded under the law, then Count 3 would also fail, or should have failed at the point that Count 4 was dismissed and, therefore, the offer of proof by the Government with respect to the introduction of the voice recording and transcript thereof was never met and said recording should not have been received into evidence.

One need only examine in a cursory manner the transcript of the recording to ascertain that the receipt into evidence of such recording without proper foundation and without relevance to the remaining crimes charged (Counts 1, 2, 5, and 6) was extremely prejudicial and may have constituted the basis upon which conviction on Counts 1 and 2 was announced by the jury.

Additionally, the effect of the acceptance into evidence of the voice recording and the amendment of Count 3 was to essentially limit the areas of defense available to the Defendant Ordner to those which were,

accordingly, presented by the defense, namely, entrapment and coercion, a limitation which would not necessarily have been present but for the method by which Counts 3 and 4 were disposed of.

The defense, therefore, centered all of its efforts in the areas of entrapment and coercion and those defenses were submitted to the jury as the only defenses on Counts 1, 2, 5, and 6 of the original indictment. The evidence with respect to those defenses was the same as to each of those Counts, and the defense made a sufficient showing to shift the burden of proof to the Government to prove beyond a reasonable doubt that the Defendant Ordner was not coerced and was not entrapped. Notwithstanding this burden, the Government made no significant evidential showing to contra the clear testimony produced on behalf of the Defendant.


In the latter regard, Defendant testified to the fact that he was led to believe that the Government informant, John Romano, had been murdered by the Government agents and, further, that he, the Defendant, believed that an effort had been made by the Government agents, posing as organized crime figures, to kidnap one of Ordner's children. The fear which Ordner acted and reacted upon was confirmed and substantiated by the publisher of a New England newspaper to whom said fears had been disclosed at the time that Ordner was acting upon them.

As a result of the Government's complete failure to meet this burden of proof, the jury was obviously confused with respect to its responsibilities and the factual circumstances presented to them and under the law as charged by the Court. This confusion is evidenced by the fact that as stated above--only the defenses of entrapment and coercion were raised as to Counts 1, 2, 5, and 6, and yet the jury acquitted as to Counts 5 and 6 and entered judgment of guilty as to Counts 1 and 2. This is not a mere inconsistent verdict. It is a verdict which, by its own terms, announces itself as either a compromise verdict which did not go to the merits of the case or a verdict based upon a failure of understanding by the jury of the law as charged by the Court. In addition to this prejudicial inconsistency, the verdict of guilty on Counts 1 and 2 is contrary to the weight of evidence as a matter of law as is supported by the fact that the same defenses resulted in acquittal based on the facts received as to Counts 5 and 6.

CONCLUSION

Based upon all of the foregoing observations and arguments, it is respectfully urged that a judgment of acquittal be entered by the Court on all Counts, notwithstanding the verdict of the jury.

Respectfully submitted



CHARLES J. IRWIN
Attorney for Defendant,
William M. Ordner, Jr.

GOVERNMENT'S AFFIDAVIT IN RESPONSE TO DEFENDANT'S POST-VERDICT
MOTION (pp. 87a-91a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

WILLIAM M. ORDNER, JR.,

Defendant.

AFFIDAVIT

76 Cr. 222 (RJW)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JAMES A. MOSS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and have responsibility for the prosecution of the above-captioned matter.

2. I submit this affidavit in response to defendant's post-verdict motion for acquittal notwithstanding the verdict of the jury entered in this matter. Defendant's motion is based upon five grounds: (a) the verdict was contrary to the weight of the evidence; (b) the verdict was inconsistent, (c) the verdict was a compromise, induced by confusion and fatigue; (d) the verdict was rendered upon an improperly amended indictment; and (e) the verdict was prejudiced by the improper admission into evidence of voice tapes.

3. The Government respectfully submits that each and every one of these objections to the jury's verdict is legally insufficient* and factually unsupported by the record.

* Indeed, defendant does not cite even one judicial authority in support of his motion for acquittal.

The Weight of The Evidence Supports
the Jury's Verdict

4. Defendant's claim that this verdict was not supported by the evidence is, to say the least, curious, especially in light of the defendant's own testimony at trial that he supplied pen guns, the components of pen guns, and hand grenades to government agents, as alleged in the indictment. At pages 6-7 of his memorandum in support of this motion (hereinafter "Br."), defendant claims that since he also testified at trial that he had been coerced and entrapped to commit these acts, and since the Government did not rebut these defenses, the jury's verdict was contrary to the weight of the evidence as a matter of law.

5. This claim is insufficient in at least two respects. First, the defendant has overlooked the very real possibility that the jury did not credit his testimony concerning coercion and entrapment. In this regard, it is significant that the defendant's testimony at trial was often contradicted by his own prior statements made during the taped October 7, 1975 conversation, which was played for the jury during the trial and again, in part, during its deliberations.

6. Secondly, the defendant is in error when he asserts that the Government failed to offer sufficient evidence to rebut his coercion and entrapment defenses. The defendant's testimony to these defenses was disproven not only by the conversations contained in the October 7, 1975 tape, but also by the testimony of Agent Kelly and Patrolman William Adams, whose testimony clearly established that the defendant was never threatened by the Government agents.

The Consistency of This Verdict
is Not Open to Attack

7. Defendant challenges his conviction on Counts One, Two and Three as "a verdict which, by its own terms, announces itself as either a compromise verdict. . . or a verdict based upon a failure of understanding by the jury of the law as charged by the Court." Defendant contends that this conclusion is supported "by the fact that the same defenses [of coercion and entrapment raised as to Counts 1 and 2] resulted in acquittal. . . as to Counts 5 and 6." (Id.) This claim is insufficient to support a judgment of acquittal notwithstanding the verdict.

8. Both the Second Circuit and the Supreme Court have held on numerous occasions that a court may not probe behind a jury's verdict based upon sufficient and properly admitted evidence, to determine the verdict's "consistency" or "rationality." United States v. Maybury, 274 F.2d 899 (2d Cir. 1960); Dunn v. United States, 284 U.S. 390 (1932); Stankler v. United States, 7 F.2d 59 (2d Cir. 1925); cf., United States v. Zane, 495 F.2d 683, 692 (2d Cir. 1974).

9. Moreover, the verdict of conviction on the first three counts was not at all inconsistent with the verdict of acquittal on the last two counts. In his testimony at trial, the defendant testified that he learned of his daughter's attempted abduction in the early part of November, 1975. The jury may well have concluded that the defendant had not proven his coercion defense as to those counts relating to pre-November 1975 crimes i.e. Counts One, Two and Three) but that he had arguably proven the defense as to the crimes he committed in and after November, 1975

(i.e. Counts Five and Six).

Defendant's Objection to The
Verdict As a "Compromise" is
Frivolous

10. Defendant further attacks the jury's verdict as "a compromise . . . based upon a confusion and fatigue of the jury." (Br. at 1.) This claim, like the defendant's challenge to the "consistency" of the verdict, is meritless. As noted above, a court may not look behind a jury's finding, to determine the rationality of the verdict. In addition, the "fatigue" which defendant ascribes to the jury was never evidenced by any of the jurors themselves, who rejected the Court's invitation to adjourn the deliberations by sending a note to the Court asking for permission to continue considering the case.

The Indictment Was Not Improperly
Amended During the Trial

11. Defendant's claim that "[t]he conviction is void as it is based upon an indictment which was substantively amended during trial without Grand Jury action and over the objection of the defense" (Br. at 1) was properly rejected when it was raised at trial. The law is well settled that a criminal charge may be submitted to a jury upon a theory of aiding and abetting, even though the indictment does not contain a specific reference to Title 18, United States Code, Section 2.

12. Furthermore, since the defense had been given access the Government's file in this case well in advance of trial, the defendant cannot claim that he was surprised or prejudiced by the Government's evidence at trial proving that he aided and abetted government agents in the possession of the 302 pen guns. In the absence of surprise and prejudice,

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even a material amendment of the indictment would not have been improper.

The Admission Into Evidence of The
Voice Tape was Entirely Proper

13. Finally, defendant argues that the jury's verdict was "prejudiced and confused" by the purportedly improper introduction of a taped conversation of the defendant. (Br. at 1.) This argument is based entirely upon defendant's mistaken notion that once the Court had dismissed Count Four of the indictment, the tape became irrelevant and, therefore, inadmissible with respect to the remaining five counts. Of course, this was not so. The tape demonstrated conclusively that the defendant was willingly and knowingly undertaking to supply government agents with an arsenal of weapons, an arsenal which expressly included pen guns (relevant to Counts 1-3) and hand grenades (relevant to Counts 5 and 6). Moreover, this tape was also relevant to rebut the defenses of coercion and entrapment raised by the defense. Consequently, the dismissal of Count Four did not render the tape inadmissible. The jury quite properly heard and considered the tape for whatever light it could shed upon the issues of this trial.

CONCLUSION

14. In conclusion, the defendant has merely raised in this same motion the very same arguments and contentions which were raised -- and rejected by the Court -- at the trial of this action. We respectfully submit that these claims merit the same action now. The motion for acquittal notwithstanding the verdict should be denied.

JAMES A. MOSS
Assistant United States Attorney

Sworn to before me this
day of September, 1976.

Notary Public

9/2

5.00/21

Handwritten: This is sealed

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
IN DISTRICT COURT
SEP 16 1 04 PM '76
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

v. : 76 Cr. 222 (RJW)

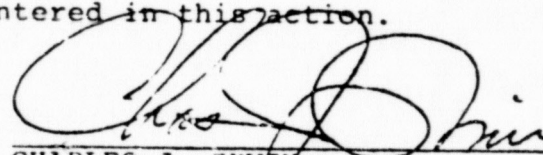
WILLIAM M. ORDNER, JR., :

Defendant. :

-----x

NOTICE OF APPEAL
(F.R. APP. P. 3 & 4)

NOTICE is hereby given that William M. Ordner, Jr., Defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the whole of the final judgment and sentence entered in this action.



CHARLES J. IRWIN
Attorney for Defendant
744 Broad Street
Newark, New Jersey 07102

Dated: September 16, 1976

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Copy to Mr Ordner 10/7/76

ORDER SETTING FORTH TIME AND PROCEDURE
FOR APPEAL
United States Court of Appeals
for the Second Circuit

ADDRESS ALL INQUIRIES TO
Ms. Korecki or
Ms. Bonett
(212) 791-0105

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

WILLIAM M. ORDNER, JR.,

76-1428
Docket No. T-6504

Defendant-Appellant.

BEFORE: IRVING R. KAUFMAN, Chief Judge

The court noting that Charles J. Irwin, Esq.
is counsel of record for William M. Ordner, Jr.
and being advised as to the progress of the appeal and that notice
of appeal was filed on September 16, 1976

IT IS HEREBY ORDERED that a copy of the transcript of
testimony shall be filed with the Clerk of the District Court on
or before October 15, 1976

IT IS FURTHER ORDERED that the ~~record~~^{appeal} be docketed ~~xxxx~~
~~before~~ and the record filed on or before October 15, 1976

IT IS FURTHER ORDERED that if the ~~record~~^{appeal} is not docketed
by the time directed, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that the appellant may, without
further order of the court, remove the record for purposes of
preparation of the appellant's brief and appendix, provided that
the record is returned to the custody of the court on or before
the date set for filing the appellant's brief.

IT IS FURTHER ORDERED that ten (10) copies of the brief
and ten (10) copies of the appendix of appellant shall be filed on
or before November 15, 1976

IT IS FURTHER ORDERED that if such brief or appendix shall
not be filed by the date set the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that ten (10) copies of the brief
of the United States shall be filed on or before December 15, 1976

IT IS FURTHER ORDERED that the court may require as many
as fifteen (15) additional copies before final disposition of
the action.

IT IS FURTHER ORDERED that the argument of the appeal be
ready to be heard during the week of January 3, 1977

A. DANIEL FUSARO,
Clerk

Dated: October 5, 1976

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SYNOPSIS OF TAPE RECORDING

(pp. 94a-95a)

The tape recording was made on October 7, 1975, as the defendant drove with Special Agent Joseph Kelly (known to the defendant as Joe Keen) and Officer William Adams (known to the defendant as Billy) from the Stagg residence at Armonk, New York to Dolan's Sporting Goods in Neptune, New Jersey.

The following topics were discussed:

- The manufacture of silencers
- The operation and manufacture of an item which Ordner described to Kelly as a machine gun
- The operation of an item described as a bazooka energizer
- The defendant's background in designing booby traps
- The possibility of manufacturing grenades
- The availability and price of automatic pistols
- How many flare gun assemblies should be purchased at Dolan's
- Machine guns that could be salvaged from junk aircraft
- The Eagle Carbine which Ordner designed
- Use of pen guns by the Government
- Nylon firearms which would not be detected by metal detectors
- Machining barrels for pen guns
- The availability of single shot pistols
- The operation of exploding gavels
- Ordner's years designing weapons for the Government
- Various firearms owned by Ordner
- Ordner's federal firearms manufacturer's license
- Pistols that could be cheaply manufactured in Mexico

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- The operation of the Mark VIII machine gun and the Sterling Pistol
- The manufacture of satchel charges
- Directions to Dolan's

The defendant, Kelly, and Adams arrived at Dolan's where Kelly purchased and paid for approximately 500 flare guns. During the trip back to Armonk, New York, the discussion continued with respect to the following:

- The flare guns just purchased by Kelly
- Exploding light bulbs
- The production of barrels for the flare guns
- Match guns
- The availability of various shotguns

The tape ran out long before the occupants of the vehicle arrived at Armonk, New York.

CERTIFICATE OF SERVICE

Docket No. 76-1428

Re: United States of America v. William M.
Ordner, Jr.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Defendant-Appellant.

That on the 15th day of November, 1976, I served the within
Brief and Appendix for Defendant-Appellant.

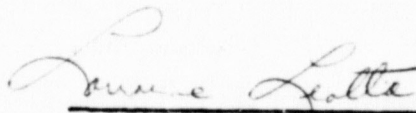
in the matter of United States of America v. William M. Ordner, Jr.

upon United States Attorney
Second Circuit
Federal Court House, Foley Square
New York, N.Y. 10007

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.


Muriel Mayer

Sworn to and subscribed
before me this 15th day
of November 1976.


A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977

